

Missouri Attorney General's Opinions - 1964

Opinion	Date	Topic	Summary
1-64	June 24	HOSPITALS. COUNTY HOSPITALS. PROSECUTING ATTORNEYS. ATTORNEYS. COUNTIES.	It is the duty of the prosecuting attorney to advise the county court and the Board of Trustees of a county hospital concerning all legal matters involving the hospital. It is the duty of the prosecuting attorney to collect delinquent bills owed such hospital. The county court may authorize the prosecuting attorney to employ associate counsel if suits are instituted for the collection of such accounts outside the county in which the hospital is located or outside the State of Missouri.
4-64	Apr 10		Opinion letter to the Honorable Joe R. Ellis
6-64	Sept 23	MAGISTRATES. MAGISTRATE COURT. REMISSION OF FINE OR SENTENCE. EXECUTION – STAY OF. JUDGMENT OF CONVICTION. SUSPENSION OF IMPOSITION OF SENTENCE. SUSPENSION OF EXECUTION OF SENTENCE. PAROLE. PROBATION.	<p>1. A magistrate judge may not remit a portion of a fine or a sentence of imprisonment previously imposed nor may he set aside a judgment of conviction previously imposed.</p> <p>2. Magistrate courts may grant a stay of execution for a period of not more than six months at the expiration of which the defendant must comply with the sentence. A bond is required during the period that execution is stayed.</p> <p>3. The magistrate court may grant a stay of execution for purposes of appeal for so long as is necessary until the judgment becomes final. A bond is also necessary under these circumstances.</p> <p>4. All magistrate courts and the St. Louis Court of Criminal Correction do have the power to suspend either the imposition or the execution of sentence following a conviction of a misdemeanor. In so doing, the judge may place the defendant on probation.</p> <p>5. Magistrate courts and the St. Louis Court of Criminal Correction are empowered to grant paroles to persons who are imprisoned pursuant to a conviction in said courts and prior to the expiration of the term of the sentence.</p>
7-64	Mar 2		Opinion letter to the Honorable Bill D. Burlison
8-64	Feb 14		Opinion letter to Mr. John W. Ridgeway
10-64	Jan 27		WITHDRAWN
11-64	Feb 28	WORKMEN’S COMPENSATION. TAXATION.	Notice of levy for income taxes under workmen’s compensation.
12-64	June 22	INDUSTRIAL DEVELOPMENT. MUNICIPALITIES.	A municipality which owns a manufacturing or industrial facility developed under Section 71.790 to 71.850, RSMo 1963 Cum. Supp., may not require a tenant thereof, as part of the leasing agreement, to

		CITIES. TAXATION.	pay monies in lieu of taxes to another taxing body.
14-64	Jan 10	SCHOOLS & SCHOOL DISTRICTS. COUNTY BOARDS OF EDUCATION.	When, does the present terms of the County Board of Education of a third class County expire, under the provisions of paragraph four (4) of the new section 165.657? In third class Counties with two (2) County Court Districts, and under the provisions of paragraph five of said statute, may the voters in one County Court District vote on candidates in the other County Court District? Does the Legislature have the power to terminate or shorten the term of a properly elected and serving County School Board member?
15-64	Feb 17	SOIL CONSERVATION DISTRICTS AND SUBDISTRICTS. TAXATION.	(1) Federal, state and county lands are not to be considered in calculating the percentage of agreements necessary to carry out recommended soil conservation measures and proper farm plans from owners of not less than sixty-five percent of the lands situated in the subdistrict required by Section 278.250, Cum. Supp. 1963; (2) The subdistrict levy under Section 278.250, supra, is to be assessed only upon real estate; (3) Under Section 278.170, Cum. Supp. 1963, the real estate in incorporated towns and cities may be included in a subdistrict and taxed; (4) For a city resident to vote in the referendum provided by Section 278.200, RSMo 1959, he must qualify as a land representative which is defined in Section 278.070, Cum. Supp. 1963; and (5) Incorporated towns and cities are not included in watershed subdistricts organized prior to October 13, 1963.
16-64	Jan 6	MOTOR VEHICLES. HABITUAL CRIMINALS. DRUNK DRIVERS.	Any person who is convicted of operating a motor vehicle in an intoxicated condition, Section 564.440, RSMo Sum.Supp. 1963, and who was previously convicted of violating Section 564.440, RSMo 1959, shall be punished as a subsequent offender under the applicable provision of Section 564.440 RSMo Cum.Supp. 1963.
19-64	Jan 23	TAXATION. MUNICIPAL HOUSING AUTHORITY.	Municipal housing authority subject to Chapter 99, RSMo 1959, not liable for ad valorem taxes assessed and levied, but not collected, on property it condemns, and such property may not be sold for such taxes.
21-64	June 5	ADMINISTRATIVE LAW. STATE BOARD OF EMBALMING.	The so-called "Pre-Need Arrangement For Memorial Services" is not a pre-need burial plan within the meaning of Section 333.035-1(12)(d), RSMo 1959, but is only a discount certificate. Licensed embalmers who directly or indirectly enter into Articles of Agreement for the sale of such plans are guilty of unprofessional conduct as defined in Section 333.035-1(12)(d). However, neither subparagraphs (c) nor (d) of this section prohibit embalmers from entering into contracts providing for the sale of genuine pre-need burial plans.

22-64	May 26		Opinion letter to the Honorable Gerald Kiser
27-64	June 24		Opinion letter to the Honorable Lawrence F. Gepford
28-64	Jan 31	CRIMINAL LAW. MISDEMEANOR. FELONY. DRIVING WHILE INTOXICATED. DRUNK DRIVERS. MOTOR VEHICLES. HABITUAL CRIMINALS. INFORMATIONS.	(1) A person charged under DWI statute before its repeal may be tried thereunder after its repeal. However, the maximum punishment cannot exceed that imposable under the new DWI statute (Section 564.440, RSMo Cum. Supp. 1963), and the minimum punishment may be imposed under the repealed DWI statute (Section 564.460, RSMo 1959). (2) Felony convictions for DWI obtained prior to October 13, 1963, may be pleaded and proved against a defendant to punish him as a subsequent offender under Section 564.440, RSMo Cum. Supp. 1963. (3) The information or complaint should recite the necessary elements of DWI and the prior convictions should be pleaded in the same manner as priors under Section 556.280, RSMo 1959.
29-64	Mar 11	ASSESSOR. COUNTY ASSESSOR. SECOND CLASS COUNTY. MILEAGE. TRAVEL EXPENSES.	An assessor of a second class county may receive from the county court reimbursement for reasonable travel expenses actually and necessarily incurred in carrying out his official duties within the county at the reasonable rate of eight cents per mile.
30-64	Feb 7	COUNTY COLLECTOR. FIRE PROTECTION DISTRICT.	The Collector of St. Louis County in collection of Fire Protection District taxes should deduct a commission of one per cent of such taxes.
32-64	Feb 19		Opinion letter to the Honorable Ronald M. Belt
33-64	Jan 30	NURSING HOMES. NURSING HOME DISTRICTS. BONDS. ELECTIONS.	Nursing home district may not issue bonds up to ten per cent of value of taxable tangible property in such district. Nursing home districts may issue bonds to an amount of five per cent of the value of the taxable tangible property in such district.
34-64	May 21	CITIES, TOWNS & VILLAGES. INCORPORATION OF CITIES. CITY MANAGER ORGANIZATION. MUNICIPALITIES. COUNTY COURT.	County court cannot incorporate unincorporated area upon petition as third class city with city manager form of government. Upon petition for incorporation as third class city with city manager form of government county court may incorporate as regular third class city.
35-64	Feb 7	BRIDGES. COMPENSATION.	It is not part of the official duties of a county highway engineer to design and supervise the construction of bridges built by a special road

		COUNTY HIGHWAY ENGINEER. HIGHWAY ENGINEER. SPECIAL ROAD DISTRICT.	district organized under the provisions of Sections 233.010 to 233.165, RSMo. The county highway engineer may be employed and compensated by such special road district to design and supervise the construction of a bridge to be built by such special road district.
39-64	Feb 6	GASOLINE TAX. SPECIAL ROAD DISTRICTS. COUNTIES.	Counties are not authorized to give a specific percentage or a specific amount of motor fuel tax moneys to a special road district to be expended as such district sees fit.
40-64	Feb 19		Opinion letter to the Honorable Charles G. Hyler
43-64	Apr 3	SALES TAX.	Section 144.025, RSMo Cum. Supp 1963 applies to every retail sale involving a trade-in allowance, regardless of whether the person seeking to avail himself of the trade-in allowance had actually paid tax on the traded-in property.
44-64	Mar 6	RECORDER OF DEEDS. COUNTY RECORDER OF DEEDS. DEATH CERTIFICATES. RECORDS.	The recorder of deeds has authority to accept for recording certified copies of death certificates.
47-64	June 8		Opinion letter to Mr. Leon F. Burton
50-64	Mar 5		Opinion letter to the Honorable Harold L. Henry
55-64	Feb 5	SCHOOLS. SCHOOL DISTRICTS. ELECTIONS.	In school districts organized under Sections 165.377-165.553 having a population of 75,000 - 200,000 where a city political committee does not exist, nominations of candidates for school directors must be made under Section 165.470 (3), RSMo 1959, i.e., by petition in the manner provided by Sections 120.180 - 120.230 RSMo. The school board of school districts organized under Sections 165.377 - 165.553 having a population of 75,000 - 200,000 have no authority to set forth by rule a method for nominating school board members. In school districts organized under Section 165.377 - 165.553, the school director election must be held in April 1964, even though no city political committee exists.
57-64	Apr 24	RECORDER OF DEEDS. THIRD CLASS COUNTIES. DUTIES. COMPENSATION.	Recorder of deeds of trust of third-class county keeping marginal release of deeds of trust record receiving additional compensation of one thousand dollars per year therefor, under Section 59.255, RSMo 1959, and who adopts microfilming for recording all instruments, as provided by Section 109.120(3), RSMo Cum. Supp. 1963, is not relieved of duty to keep marginal release of deeds of trust record. He shall continue keeping said record and receiving compensation therefor, as long as all previously nonmicrofilm-recorded deeds of trust capable of

			release by marginal entry remain unsatisfied of record. When all such deeds of trust have been satisfied of record, recorder shall cease to keep marginal release of deeds of trust and shall not be paid any further compensation for keeping said record.
58-64	May 15	STATE BOARD OF COSMETOLOGY. RULES. REGULATIONS. ADMINISTRATIVE LAW. COSMETOLOGY.	The State Board of Cosmetology may issue reasonable regulations: (1) prescribing the course of study in a licensed school; (2) prescribing the minimum floor space for obtaining and keeping a school license; (3) requiring advertising by schools to be nondeceptive so that work done by students must be advertised as such; (4) prescribing a reasonable examination for applicants for school licenses; (5) prohibiting the use of brush curlers in licensed schools and shops if it is impracticable to keep them sanitary or making reasonable sanitary requirements. The State Board of Cosmetology has not been authorized by statute to make regulations: (6) prohibiting a licensed school owner from having a licensed shop; (7) requiring a shop owner who teaches an apprentice to be a licensed instructor.
59-64	Jan 22	BOARD OF COSMETOLOGY. COSMETOLOGY. COMPENSATION.	Members of Board of Cosmetology cannot be compensated for conducting examinations.
61-64	Jan 16		Opinion letter to the Honorable Robert B. Paden
62-64	Feb 24	COUNTY COURTS. ELECTIONS. TIME.	County courts do not have authority to regulate time standards to be used in the county. County court is without power to order or conduct an election for adopting a uniform time standard for the county.
64-64	Mar 6		Opinion letter to the Honorable Frank Conley
65-64	Mar 23	CRIMINAL LAW. CRIMINAL PROCEDURE. CONSECUTIVE SENTENCE. CONCURRENT SENTENCE. SENTENCING. DEPARTMENT OF CORRECTIONS.	1) That portion of Section 222.020, RSMo 1959, which provides that sentences must be cumulative in certain instances, does not apply when the defendant already under sentence to the custody of the Department of Corrections, is convicted of another crime committed prior to imposition of the sentence which he is serving. 2) Where no statutory requirement to the contrary applies, it is within the discretion of a court imposing sentence to the custody of the Department of Corrections to determine whether or not it shall be served consecutive to or concurrent with prior sentences to the same department.
67-64	Mar 6	BONDS. REVENUE BONDS. NURSING HOMES. COUNTY COURTS.	The county court has authority under Section 205.375, RSMo 1959, to issue revenue bonds for the purpose of acquiring land and sites for nursing homes.
68-64	Jan 16	INSURANCE.	Articles of Incorporation of First American Security Life Insurance

			Company
69-64	Feb 14		Opinion letter to the Honorable Charles P. Moll
70-64	May 25		Opinion letter to the Honorable Norman J. Williams
72-64	Jan 17	BANKS. TREASURER. STATE TREASURER. STATE DEPOSITORY. DEPOSITARIES. STATE MONEYS. CONSOLIDATION OF BANKS.	When two banks having state depository contracts consolidate, unnecessary to execute depository contract with consolidated bank.
73-64	Mar 9	ASSESSORS. ASSESSMENT OF PERSONAL PROPERTY. TAXATION. TAXATION OF PERSONAL PROPERTY. AGRICULTURAL FIELD CROPS.	1. Section 137.115(2), RSMo 1959, respecting the assessment for taxation of agricultural field crops, does not violate Art. X, Sec. 4 (a) and (b) of the Constitution of Missouri and is constitutional. 2. The taxpayer should claim his right to exemption under Section 137.115 by informing the assessor when taxable personal property consists of agricultural field crops in an unmanufactured condition intended to be used solely as seed or in the feeding of livestock or poultry.
75-64	Mar 31		Opinion letter to Mr. Proctor N. Carter
76-64	Mar 6	INHERITANCE TAX WAIVERS. CORPORATE STOCK.	If, after the filing of the inventory and appraisement of the estate of the decedent, it is the opinion of the court entered of record that these items are not taxable, then and only then do the provisions of Section 145.210, RSMo become inoperative.
77-64	Mar 16	GASOLINE TAX. STATUTORY CONSTRUCTION.	Motor fuel tax claims for refund which had not been filed with the Collector of Revenue within 120 days next preceding October 13, 1963, had legally expired and were not revived when Section 142.230, RSMo Cum. Supp. 1963 was amended extending the period of filing such claims from 120 days to one year.
78-64	Jan 23		Opinion letter to the Honorable Brunson Hollingsworth
79-64	Nov 10		WITHDRAWN
80-64	Mar 9	COUNTY CLERK. DEPUTY COUNTY CLERK. JOHNSON GRASS.	A deputy county clerk may accept additional employment from the County Weed Control Board and receive compensation for his services. This compensation is separate from and is not to be considered subject to the limitations imposed by Section 51.450, RSMo relating to the compensation of deputy county clerks.
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84-64	Feb 4		Opinion letter to the Honorable M. E. Morris
86-64	Mar 6	ELECTIONS. CANDIDATES. FILING FEES.	Candidates who filed for office and paid their filing fee prior to October 13, 1963, as required by Section 120.350, RSMo 1959, need not pay an additional filing fee as required by Section 120.350, RSMo Cum. Supp. 1963 in order to be eligible candidates.
87-64	July 8		Opinion letter to the Honorable M. E. Morris
88-64	May 22	ACCREDITATION. BUSINESS COLLEGES. COLLEGES. CONTRACTS. INSURANCE. MINORS.	Capitol Business College is not “an accredited university, college or conservatory” within the meaning of Section 431.067, RSMo Cum. Supp. 1963; hence, a minor cannot execute a legally binding note or notes for his education at that institution.
93-64	Mar 11	LINCOLN UNIVERSITY. STATE TREASURER.	The State Treasurer should not transfer the balance in the Lincoln University Fund to the General Revenue Fund.
95-64	Feb 12	INSURANCE.	Articles of Incorporation of Republic States Life Insurance Company
96-64	Mar 11	VAGRANCY. MISDEMEANOR. NONSUPPORT. CRIMINAL LAW.	A man may be prosecuted under Section 563.340, 1959, relating to vagrancy, for his willful neglect or refusal to support his family, even though he is divorced at the time prosecution is initiated, if such willful neglect or refusal is alleged to have taken place prior to said divorce.
98-64	Mar 4		Opinion letter to the Honorable Maurice Schechter
99-64	Mar 5		Opinion letter to the Honorable Milton Carpenter
100-64	Feb 13		Opinion letter to the Honorable J. E. Schellhorn
101-64	Mar 19		Opinion letter to the Honorable Frank M. Karsten
102-64	Feb 18		WITHDRAWN
103-64	Feb 28		Opinion letter to the Honorable Kennard L. Fenton
104-64	Feb 18		Opinion letter to the Honorable Herman G. Kidd
105-64	Oct 14	COUNTY CLERK. COUNTY COURT. COUNTY HIGHWAY ENGINEER. COUNTY WARRANTS. HIGHWAY ENGINEER. PRESIDING JUDGE. PURCHASES. WARRANTS.	(1) County engineer of a third class county is not authorized to purchase material and incur expenses on behalf of county in absence of order of record by county court; (2) New county highway engineer has no authority to approve unauthorized expenditures incurred by former county highway engineer and the county court may not ratify and pay such bills; (3) Presiding judge of the county court is not required to sign warrants for expenses incurred by unauthorized county officer; (4) County warrant not signed by presiding judge of county court cannot be lawfully issued; (5) Without order of record, county clerk may not issue and presiding judge is not authorized to sign county warrant.

107-64	Feb 25		Opinion letter to Mr. Austin Hill
108-64	Feb 28		Opinion letter to the Honorable David Thomas
109-64	Apr 28	TUITION. SCHOOLS. HIGH SCHOOL TUITION. SCHOOL DISTRICTS.	The term “debt service” as used in Section 161.095, RSMo 1963 Supp., refers only to the indebtedness of the high school attended and the indebtedness of other schools is not included within this term.
111-64	Mar 2		Opinion letter to the Honorable Joe R. Ellis
113-64	July 7	COMPENSATION. COUNTY CLERK. DEPUTY CLERK. DEPUTY REGISTRATION CLERK. REGISTRATION OFFICER. SALARY.	Limitation on the amount a clerk of a third class county may pay for deputy hire in Section 51.450 RSMo does not apply to limit the amount he may pay a deputy registration clerk appointed under Section 116.030 RSMo. Such deputy registration clerk may be assigned duties in the nature of those ordinarily performed by a deputy clerk.
114-64	Mar 3		Opinion letter to the Honorable Daniel V. O’Brien
116-64	Mar 27	CRIMINAL LAW. CRIMINAL PROCEDURE. FELONIES. INFORMATIONS. TRIAL. SEPARATE CRIMES. WAIVER.	A defendant may not properly be charged and convicted at the same trial of two distinct felonies (except as authorized by statute) unless he waives this procedure by not objecting during trial or after trial.
117-64	Mar 10	TOWNSHIPS. COMMITTEE. WARDS. TOWNSHIP COMMITTEES.	In a township which contains a city ward from which committeemen and committeewomen are elected, a resident of such city ward may not file for the position of township committeeman or committeewoman.
119-64	Mar 6		Opinion letter to the Honorable William E. Seay
120-64	Mar 4	LIBRARY. LIBRARY BOARD. CITY LIBRARY BOARD. ST. JOSEPH LIBRARY BOARD. PURCHASE OF BOOKS AND SUPPLIES.	The city library board of the City of St. Joseph is authorized by the charter and by the statutes, to make its own purchases of necessary books and supplies for the use of the library. No order or ordinance of the City of St. Joseph or its officers compelling the purchase of all supplies by the city purchasing agent, is applicable to the city library board.

		CITY PURCHASING AGENT. CITY PURCHASES.	
122-64	Apr 21	CRIMINAL LAW. PROSECUTING ATTORNEY.	Prosecuting Attorney has not further jurisdiction over criminal case erroneously commenced in his county, but transferred by Circuit Court to proper county in which crime was committed.
123-64	June 4	SALES TAX. INSECTICIDES.	The sale of Aldrain granules which are planted with corn seed is not exempt from the Missouri sales tax.
128-64	June 1	ELECTIONS. JUDGES OF ELECTION. VOTERS. COMPARATIVE SIGNATURE CARD.	Any question of doubt concerning the identity of a voter who signs the comparative signature card under Section 118.475, RSMo Cum. Supp. 1963, must be decided against the voter by a majority of all judges of election in the precinct before he may be denied the right to vote by reason thereof. A voter who is denied the right to vote on such ground is entitled to vote upon complying with the procedure set out in Section 118.490, RSMo. A voter who willfully refuses to sign the comparative signature card is not entitled to vote.
129-64	Apr 1	ELECTIONS. BALLOTS. ABSENTEE BALLOTS. VOTING. REGISTRATION. PEACE CORPS.	Peace Corps Volunteers may vote absentee ballots even though not registered.
131-64	June 26	PLANNING COMMISSION. ATTORNEYS RIGHT TO EMPLOY. PROSECUTING ATTORNEYS.	Planning Commission may not employ legal counsel. The prosecuting attorney must act for Planning Commission.
132-64	July 15	FEES & SALARIES. SHERIFFS.	Sheriffs in Second Class counties may retain civil fees as prescribed in Section 57.280, RSMo 1959, only to amount allowed by Section 57.340, RSMo 1959, and are prohibited by Section 57.380, RSMo 1959, from retaining fees collected in criminal cases as outlined in Section 57.290, RSMo 1959. Sheriffs and their deputies in Second Class counties may be reimbursed for travel expense, incurred in making criminal investigations.
133-64	Mar 18	COUNTY BOARDS OF EDUCATION. ELECTIONS. SCHOOLS. SCHOOL DISTRICTS.	All residents of a school district shall vote as prescribed by law upon the county board of education (Section 165.657, RSMo 1963 Cum. Supp.) which has jurisdiction over their district regardless of what county the voter lives in. Where a part of a school district projects outside the county and is contiguous to both county court districts, the

			county court district line is to be also projected so as to bisect the whole district and all voters of the district are to vote upon those members of the county board of education to be elected from the area on that side of the bisecting line in which the voter resides.
135-64	Apr 24	PUBLIC ADMINISTRATOR.	The public administrator is an elected county official and must file with the county clerk a certified list of all fees received for performance of his statutory duties as provided by Section 51.150, paragraphs (5) and (6), RSMo Supp. 1963.
136-64	Mar 18	INSURANCE.	Articles of Incorporation of Mid-West National Fire and Casualty Insurance Company.
137-64	May 19		Opinion letter to the Honorable Daniel V. O'Brien
138-64	May 7		Opinion letter to the Honorable Maurice Schechter
139-64	July 1		Opinion letter to George A. Ulett, M. D.
140-64	May 19		WITHDRAWN
141-64	July 14		Opinion letter to the Honorable Brunson Hollingsworth
142-64	May 13		Opinion letter to the Honorable Ronald M. Belt
145-64	June 2	AIRPORTS. BONDS.	County may issue bonds for acquiring an airport and for erecting buildings thereon and for equipping said airport for the purpose for which it was constructed.
146-64	Apr 3		Opinion letter to the Honorable A. M. Spradling, Jr.
147-64	Apr 1	STATE RETIREMENT BOARD. COMMISSION ON HIGHER EDUCATION. UNIVERSITY OF MISSOURI.	An employee of the Missouri Commission on Higher Education is not eligible for membership in the University of Missouri Retirement Plan. However, he must become a member of the Missouri State Employees' Retirement System at the time of his employment with the Commission.
148-64	May 19		Opinion letter to the Honorable Ralph H. Duggins
149-64	Apr 22	OFFICERS. CITY MARSHAL. CHIEF OF POLICE. FOURTH-CLASS CITIES. CITIES, TOWNS and VILLAGES.	In a fourth class city the office of elected marshal is abolished when a chief of police is appointed, the appointment being authorized by ordinance enacted pursuant to a vote of the people under provisions of Section 79.050, RSMo.
152-64	June 22		Opinion letter to Mr. James T. Riley

153-64	Apr 17		Opinion letter to Mr. William A. McDonnell
154-64	July 27	CORPORATION.	A stock business corporation may not provide by its articles of incorporation for the distribution of its assets upon dissolution to organizations of a charitable or tax-exempt nature.
155-64	May 18	CONSERVATION COMMISSION. COUNTY CLERKS. SALARIES AND FEES.	Section 51.150, RSMo Supp. 1963, requires the county clerk to file a certified list of all salaries and nonaccountable fees received by each elected county official by virtue of his office. County Clerks are not required to include service fees received for distributing hunting, fishing, trapping and replacement permits in this list as a county clerk does not receive these fees by virtue of his office.
156-64	May 13		Opinion letter to the Honorable Francis Toohey, Jr.
158-64	Apr 22		Opinion letter to the Honorable John B. Mitchell
160-64	Apr 7		Opinion letter to the Honorable James G. Lauderdale
161-64	June 22		WITHDRAWN
162-64	July 16	SCHOOLS. BALLOTS. COUNTY BOARD OF EDUCATION. ELECTIONS.	A qualified voter has the right to cast a write-in ballot in the election under Section 165.657(4), RSMo 1963 Supp., of members of the county board of education of second, third, and fourth class counties, and that such ballots, if otherwise proper, must be counted for the persons written thereon.
164-64	Apr 16	INSURANCE.	Articles of Incorporation of Ozark National Life Insurance Company.
165-64	July 21		Opinion letter to the Honorable Frank Bild
166-64	Apr 21	SCHOOL BUSES. SCHOOLS.	Licensing of school buses under Section 301.060 (9), RSMo
169-64	May 19		WITHDRAWN
170-64	May 14	INSURANCE.	Articles of Incorporation of the proposed Covenant Security Insurance Company are legally insufficient, and require amendment before certification under Section 379.040, RSMo 1959.
172-64	Apr 24		Opinion letter to Mr. William E. Siebert
173-64	July 15		WITHDRAWN
174-64	May 15	LEVEE DISTRICTS. LEVEE DISTRICT SUPERVISORS. TAXATION.	The supervisors of a circuit court levee district have authority under Section 245.175 to levy an additional tax for organizational purposes if the total levies do not exceed one dollar per acre.
177-64	Apr 24	INSURANCE.	Articles of Incorporation of Great Missouri Life Insurance Company.

180-64	June 8		Opinion letter to the Honorable William G. Johnson
183-64	July 15		Opinion letter to the Honorable William E. Seay
184-64	May 5		Opinion letter to R. A Michael, D. O.
185-64	May 22	CRIMINAL LAW. CRIMINAL PROCEDURE. MAGISTRATES. MAGISTRATE COURT. PRELIMINARY EXAMINATION. SUPREME COURT RULES.	Person charged with felony may be bound over after preliminary examination for appearance at some specific time sooner than the day of the next term of circuit court. A criminal case may be tried at the discretion of the court having jurisdiction if the defendant is given a reasonable time to prepare his case.
186-64	June 1		Opinion letter to the Honorable Haskell Holman
189-64	July 8		Opinion letter to the Honorable Don E. Burrell
191-64	Oct 5	INCOME TAX. TAXATION. DEPRECIATION. RULES AND REGULATIONS.	Director of Revenue cannot promulgate rule allowing depreciation in amount greater than original cost price of item.
192-64	July 9		WITHDRAWN
193-64	May 13		WITHDRAWN
194-64	May 13		Opinion letter to the Honorable Warren E. Hearn
196-64	May 21		Opinion letter to the Honorable James I. Spainhower
198-64	June 23		Opinion letter to the Honorable Don F. Whitcraft
200-64	July 1		Opinion letter to Mr. John E. Kelley
201-64	Aug 6	CHECKS. INSUFFICIENT FUND CHECKS. CRIMINAL LAW. CORPORATIONS. CORPORATION OFFICERS.	Corporate officer who makes or delivers insufficient fund check of corporation to pay corporate debt with intent to defraud and with knowledge of insufficient funds subject to prosecution under Section 561.460.
202-64	Aug 31	SCHOOLS. COUNTY BOARD OF EDUCATION. NOTICE.	1. Where all members of the county board of education (Section 165.657 et seq., RSMo) have actual knowledge of the time, place, and purpose of a meeting reasonably in advance, failure to mail written notice as prescribed by Section 165.663, RSMo 1959, does not

			invalidate the meeting. 2. If no notice (either that prescribed by Section 165.663 or any other) is given of a meeting of a county board of education and all of the members do not attend and the absent members could have attended if notified, then the meeting and any transactions thereat which require board action are invalid.
203-64	June 9	WORKMEN'S COMPENSATION. DEPARTMENT OF CORRECTIONS.	An inmate of the Missouri State Penitentiary assigned for work in the license plate manufacturing division who sustains an injury as a result of an accident, arising out and in the course of said employment, is not an employee of the Department of Corrections, and, therefore, not entitled to benefits of the Workmen's Compensation Act.
204-64	July 1		Opinion letter to Mr. E. H. Berry
205-64	July 22		Opinion letter to the Honorable Daniel V. O'Brien
206-64	Nov 5		Opinion letter to the Honorable Daniel V. O'Brien
207-64	June 8		Opinion letter to the Honorable Robert E. Yocom
208-64	May 25	INSURANCE.	Articles of Incorporation of Capitol Mutual Casualty Insurance Company.
210-64	May 27		Opinion letter to the Honorable Bill D. Burlison
211-64	Aug 24		Opinion letter to Dr. H. M. Hardwicke
212-64	June 15		Opinion letter to the Honorable Douglas Mahnkey
213-64	June 30		Opinion letter to the Honorable Brunson Hollingsworth
214-64	June 2	INSURANCE.	Articles of Incorporation of Covenant Security Insurance Company.
215-64	June 2		Opinion letter to the Honorable Charles H. Baker
216-64	July 13		Opinion letter to the Honorable Gladys B. Stewart
218-64	Dec 30	BI-STATE DEVELOPMENT AGENCY. TAXATION. EXEMPTION FROM TAXATION. CHARITIES. CHARITABLE USE OF PROPERTY.	The property of the Bi-State Development Agency, used for the well-being, welfare and convenience of the Bi-State Metropolitan Development District, is exempt from taxation.
219-64	July 9		Opinion letter to Mr. John A. Owens
220-64	June		Opinion letter to the Honorable William G. McCaffree

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222-64	Sept 16	COUNTY BUDGET LAW. SECOND CLASS COUNTY. EMERGENCY FUND. CONTINGENT FUND.	Purchase of real estate for addition to courthouse by second class county may be made out of emergency fund created under Section 50.540, RSMo. Purchase price may be paid over period of years if obligation at time it is incurred does not exceed annual revenue plus unencumbered balances from previous years.
224-64	Oct 2		WITHDRAWN
225-64	Aug 18		Opinion letter to the Honorable Gladys B. Stewart
226-64	July 31		Opinion letter to the Honorable Paul D. Hess, Jr.
227-64	Aug 5	CHAUFFEURS' LICENSE. COMPENSATION FOR SERVICES. REGULAR OPERATION.	A sheet metal worker is not required to have a chauffeur's license to operate his employer's trucks if the trips are so occasional and infrequent that they are not part of the employee's duties.
229-64	June 24		Opinion letter to the Honorable Robert P.C. Wilson, III
230-64	July 10	INSURANCE.	Articles of Incorporation of Country-Wide Life Insurance Company.
231-64	July 2		Opinion letter to the Honorable J. R. Fritz
232-64	July 13		Opinion letter to the Honorable Galdys B. Stewart
233-64	July 17		Opinion letter to the Honorable William H. Bruce, Jr.
234-64	Aug 19	PLANNING AND ZONING. CONTINUANCE OR DISCONTINUANCE. CANNOT BE VOTED UPON. THIRD CLASS COUNTIES.	A proposition as to whether planning and zoning shall be continued or discontinued in third class county of Phelps, cannot be submitted to voters at next general election.
235-64	June 19		Opinion letter to the Honorable Frank Conley
236-64	Oct 12		Opinion letter to the Honorable Lon J. Levvis
237-64	July 2		Opinion letter to Mr. Robert C. Simonds
238-64	Aug 24	CORPORATE DIRECTORS.	In all elections for the Board of Directors, voting shareholders are entitled to vote cumulatively for all directors to be elected and the

		CUMULATIVE VOTING.	Articles of Incorporation (or amendments), may not limit such voters to the election of only a certain number of directors.
239-64	Aug 23	CORPORATIONS. ARTICLES OF INCORPORATION. CHARTERS. PROBATE COURT. EXECUTORS. ADMINISTRATORS. ADMINISTRATION. WILLS.	Executors named in will may as natural persons become incorporators of a corporation to carry on the business of decedent by order of the Probate Court under Section 473.300.
240-64	July 8		Opinion letter to Mr. Charles W. Kunderer
243-64	Dec 4	NURSING HOMES. NURSING HOME DISTRICTS. COUNTY COURT. INDIGENTS.	Nursing home districts have authority to prescribe reasonable fees as a prerequisite to admission to nursing homes operated by the nursing home district and the obligation to support indigent poor persons who are residents in the county is still an obligation of the county court or other persons or agencies having a statutory duty of support and such support is not an obligation of the nursing home district.
245-64	July 17		Opinion letter to the Honorable Charles P. Moll
248-64	Aug 3		WITHDRAWN
249-64	July 29		Opinion letter to Dr. Ben Morton
250-64	July 1		Opinion letter to H. M. Hardwicke, M.D.
253-64	July 7	INSURANCE.	Articles of Incorporation of Great Heritage Life Insurance Company.
254-64	Nov 23	ROAD DISTRICTS. SPECIAL ROAD DISTRICTS. GENERAL ROAD DISTRICTS. ELECTIONS. SPECIAL ELECTIONS.	A proposition to levy an additional road tax in accordance with Section 137.565, RSMo 1959, may be held in a general road district on the same day and in connection with a general election.
255-64	Aug 6		Opinion letter to the Honorable Thomas D. Graham
257-64	Aug 3		Opinion letter to the Honorable Warren E. Hearnese
258-64	Sept 9	BANKS.	State Chartered Banks have no authority to purchase stock in an Industrial Development Corporation.
260-64	July 14	INSURANCE.	Articles of Incorporation of American Independence Life Insurance Company.
263-64	Aug 13	WELFARE, DIVISION	Division of Welfare may use its State appropriated administration funds

		OF.	together with funds granted by the Federal Government to carry out a staff development program involving full-time educational leave to its selected employees.
265-64	Dec 31	LOTTERIES. NEWSPAPER PROMOTION.	A newspaper subscription contest in which contestant is awarded points for subscriptions sold does not constitute a lottery in violation of Section 563.430 because the element of chance is absent.
266-64	July 13	INSURANCE.	Articles of Incorporation of All American Life Insurance Company.
267-64	Aug 5		Opinion letter to the Honorable Harry E. Hatcher
269-64	July 15		Opinion letter to Representative Thomas A. Walsh
275-64	Aug 25	ELECTIONS. VOTING. ABSENTEE VOTERS. VOTER REGISTRATIONS.	In counties governed by Chapter 114, local option registration law, county clerk should furnish registration forms to persons who cannot register in person because of illness, disability or absence from county only upon written application of such person, stating the facts relative to illness, disability or absence.
276-64	Aug 12	RESTAURANTS. MEALS. READY-TO-EAT MEALS. MEAT. POULTRY.	Fried chicken sold for consumption off premises and not part of complete meal must be sold by weight.
277-64	Oct 1	LINCOLN UNIVERSITY. BOARD OF CURATORS.	(1) Board of Curators of Lincoln University may confer honorary degrees and titles by a majority vote of the quorum. (2) Board of Curators may take-valid action relating to the payment of bills and other such matters if a majority of a quorum affirmatively vote for such action. (3) The Board of Curators may delegate to an executive board authority to ascertain facts and to make recommendations to the full board.
278-64	Aug 17		Opinion letter to the Honorable Vernon C. Mayfield
279-64	Nov 20	LIBRARY BOARDS. LIBRARY DISTRICTS. CITY DISTRICTS. COUNTY DISTRICTS. CITY-COUNTY LIBRARIES. CONSTITUTIONAL LAW.	A City-County library board is authorized to construct a library building and employ architects provided Article VI, Section 26(a), of the Missouri Constitution is not violated, which prohibits incurring indebtedness in any year/exceeding the income and revenue for that year plus unencumbered balances from previous years.
280-64	Aug 14		Opinion letter to the Honorable Leon F. Burton
282-64	Sept 28	SOCIAL SECURITY.	The Missouri Bar is an instrumentality of the state as defined in Section

		MISSOURI BAR. STATE EMPLOYEE. INSTRUMENTALITY. STATE INSTRUMENTALITY. JURISTIC ENTITY.	105.300 (7) RSMo. It is a juristic entity, legally separate and distinct from the state, whose employees are not state employees.
283-64	Sept 9	INCOMPATIBILITY. OFFICERS. COUNTY HIGHWAY ENGINEER.	It is incompatible for the same person to hold the office of county highway engineer of a county of the third class and to also be employed as a laborer by the same county road system.
284-64	Sept 16	ELECTION. NONPARTISAN CANDIDATES.	Chapter 120, RSMo 1959, authorizes candidacy through the usual primary election process or by nominating petitions.
285-64	Dec 4	CERTIFIED PUBLIC ACCOUNTANTS. ACCOUNTANTS. LICENSES. LICENSE TAX. CITIES, TOWNS, AND VILLAGES.	A third class city cannot levy a license tax on accountants.
286-64	Dec 14	AIRPORTS. BI-STATE DEVELOPMENT. CITIES. COUNTIES. ZONING.	The mere zoning of land as "Small Farm" by the City of Fenton would not preclude (1) the City or County of St. Louis, (2) the City and County acting jointly, or (3) the Bi-State Development Agency from condemning such land for airport purposes.
287-64	Sept 24		Opinion letter to the Honorable Charles G. Hyler
288-64	Sept 30		Opinion letter to Mr. Leon F. Burton
289-64	Aug 19	COUNTIES. COUNTY COURTS. COUNTY HOSPITALS. HOSPITALS.	County hospital, established under Section 205.350, can be operated only by county court, not by board of trustees or nonprofit corporation.
291-64	Dec 8	HARDSHIP DRIVING PRIVILEGE. MOTOR VEHICLES. DRIVERS LICENSES. CIRCUIT JUDGE. CRIMINAL LAW. PROSECUTING ATTORNEY.	Circuit court granting limited driving privilege may amend or modify order at any time. Person operating car contrary to limited driving privilege order subject to criminal charge. Conviction of charge of operating contrary to limited driving order is basis for revocation of order by court granting such order.

292-64	Sept 16	STATE TAX COMMISSION. TAXATION. COUNTIES. SCHOOL DISTRICTS. ASSESSMENTS. APPEALS TO STATE TAX COMMISSION. COUNTY BOARD OF EQUALIZATION.	Neither a county, an officer thereof nor a school district has a right to appeal to the State Tax Commission from a decision of a county board of equalization, determining the assessed valuation of an individual property.
294-64	Oct 5		Opinion letter to Mr. Ralph H. Duggins
295-64	Aug 21		WITHDRAWN
296-64	Sept 8		Opinion letter to the Honorable James E. Conway
297-64	Aug 21		Opinion letter to the Honorable Thomas D. Graham
298-64	Sept 9		WITHDRAWN
299-64	Aug 31		Opinion letter to the Honorable Daniel V. O'Brien
300-64	Aug 28		Opinion letter to Mr. Charles E. Cates
302-64	Nov 27	TAXATION. ROADS AND BRIDGES. SECOND CLASS COUNTY. COUNTY BUDGET LAW.	Where second class county has levied a tax under Section 137.555, RSMo 1959, for the purpose of creating a Special Road and Bridge Fund and budget adopted for fund under Sections 50.025 to 50.660, RSMo, and funds received from tax are in excess of amount budgeted, the budgeted amount for this fund cannot be changed or amended.
303-64	Nov 6	LICENSING. MOTOR VEHICLE. MOTOR VEHICLE LICENSES. TRAILER.	A dolly used to tow disabled automobiles to and from a salvage yard is not a trailer as defined in Section 301.010 (27) (28) and is not required to be registered and licensed by the state.
305-64	Nov 30	FAIRS. COUNTY FAIRS. CITIES, TOWNS, AND VILLAGES. TAXATION. PARKS. CONSTITUTIONAL LAW.	A county which presently levies the maximum property tax authorized by the Constitution may not levy an additional tax to secure funds for a county fair under authority of Section 64.755, RSMo Cum. Supp., so long as a city within the county levies a tax on property within the city for park purposes, one of those purposes set out in Section 64.755. Nor may a county submit a proposed tax to the public in anticipation of legislative action authorizing the proposed tax.
309-64	Sept 14		Opinion letter to Major General A. D. Sheppard
312-64	Sept 18	DOCTORS.	Chiropodists prohibited from treating systemic diseases including

		PRACTICE OF MEDICINE. MEDICINE. HEALING ARTS. BOARD OF HEALING ARTS. CHIROPODISTS. PODIATRISTS.	"nerves" even though such diseases affect patient's foot.
314-64	Oct 5	INCOME TAX. INCOME TAX RETURNS. CONFIDENTIAL INFORMATION.	No person other than a grand jury, prosecutor or Attorney General may obtain information from the Director of Revenue concerning income tax returns, including disclosure of whether or not a return has been filed.
315-64	Sept 30	INSURANCE.	Articles of Incorporation of the Life and Health Insurance Company of St. Louis.
316-64	Sept 16	BOARD OF PHARMACY. ZONING. ADMINISTRATIVE LAW.	Restrictions imposed by city ordinance provide no basis for the Missouri Board of Pharmacy to refuse to license a pharmacy which is otherwise qualified for license.
320-64	Sept 28		Opinion letter to the Honorable Earl R. Blackwell
321-64	Dec 31		Opinion letter to George A. Ulett, M.D.
322-64	Oct 12	SHERIFFS' BILLS. BOARDING OF PRISONERS.	Sheriffs' bills submitted to the county clerk for board of prisoners must be based on actual cost in accordance with the mandate of Section 221.090 (1).
323-64	Oct 13	OFFICERS. COUNTY OFFICERS. ELECTIONS. PROBATE JUDGE. VACANCIES.	Appointed probate judge serves until the next general election at which a successor is elected.
324-64	Oct 2	ELECTIONS. VOTING. OLD AGE ASSISTANCE. WELFARE. COUNTY INFIRMARY. COUNTY POORHOUSE.	Persons who are receiving old age assistance or welfare or general relief payments from the state or county are entitled to vote unless they are actually residing in the county infirmary.
325-64	Oct 16		Opinion letter to Mr. Harold Owens

326-64	Oct 28		Opinion letter to the Honorable Rolin T. Boulware
327-64	Oct 13	ELECTIONS. BALLOTS. ABSENTEE BALLOTS. COUNTY CLERK. AFFIDAVITS.	County Clerk cannot require application for absentee ballot to be sworn to.
328-64	Sept 29	ELECTION. SAMPLE BALLOTS.	Third Class counties without voting machines are not required to print and distribute sample ballots in General Elections.
331-64	Nov 10	BONDS. COUNTY COURT. OFFICE SPACE. PUBLIC ADMINISTRATOR.	1. County court is not required to but may furnish an outgoing public administrator with an office. 2. County court has no obligation to pay the bond premium of incumbent or outgoing public administrator.
333-64	Oct 29		WITHDRAWN
338-64	Nov 2	BANKS. LIQUIDATION PROCEEDINGS. DIVISION OF FINANCE. COMMISSIONER OF FINANCE.	The Division of Finance may in its discretion properly advise the FDIC not to pay certain claims of corporate depositors asserted against the FDIC when an officer or debtor of a bank in liquidation has a financial interest in such corporate depositor.
340-64	Nov 6		Opinion letter to the Honorable William G. McCaffree
342-64	Oct 16	INSURANCE.	Articles of Incorporation of United Mutual Insurance Company.
343-64	Oct 12	INSURANCE.	Articles of Incorporation of Family Benefit Life Insurance Company
344-64	Nov 30	CAMPAIGN EXPENSES. ASSESSMENTS.	Political committee assessments are reportable campaign expenses.
345-64	Oct 15	ELECTIONS. VOTING. POLITICAL PARTIES. WRITE-IN VOTES.	Write-in votes must be counted and totaled without regard to the party ticket the voter chances to use.
346-64	Nov 6		Opinion letter to the Honorable Virgil Conkling
347-64	Oct 12	INSURANCE.	Articles of Incorporation of the Executive Security Life Insurance Company
348-64	Oct 12	INSURANCE.	Articles of Incorporation of the Modern Assurance Life Insurance Company
349-64			

349-64	Nov 9	ASSESSORS. COUNTY CLERKS. COUNTY WARRANTS.	The preceding twelve month period for which payments to a county assessor in a third class county not having township organization under Section 53.143, RSMo Cum. Supp., 1963, is based is the preceding twelve-month period beginning September first and ending August thirty- first. The county treasurer should issue the warrants for such payments although the county clerk shall perform all duties relating to the social security contributions in respect to those payments.
350-64	Dec 30	COUNTY SUPERINTENDENT. OFFICERS. COMPATIBILITY OF OFFICES. TEACHERS.	1. The capacities of county superintendent and public teacher are incompatible. 2. If a county superintendent accepts employment as a public school teacher he ipso facto vacates his office as county superintendent. 3. If the office of county superintendent is vacated by acceptance of a second incompatible position, the county superintendent's right to compensation ceases and also the county court does not have authority to employ clerical assistance for the county superintendent's office.
352-64	Oct 23	OFFICERS. PUBLIC OFFICERS. RETIREMENT. STATE EMPLOYEES.	Retirement is compulsory for all employees of the State Board of Barber Examiners at the age of 65 years, except that (1) any employee, upon written request, with the written approval of the President of said barber board filed with the Retirement Board in advance of the retirement date, may be retained for successive periods of one year until age 70; and except that (2) any person with professional, scientific or technical skills who is so certified to the trustees of the retirement system by his department head and such certification approved by the Retirement Board, shall not be precluded employment or continued employment at any age. The Governor may appoint any person to the State Board of Barber Examiners who meets the requirements of Section 328.030, RSMo, regardless of age.
353-64	Oct 16		Opinion letter to the Honorable Lawrence A. Schneider
356-64	Dec 7	ELECTIONS. ABSENTEE BALLOTS. VOTING. NOTARY PUBLIC.	1. When absentee ballots are sent by mail they must be directed to the voter and sent by Certified Mail with return receipt and addressed to the voter at the place where he is actually residing. 2. Absentee ballots must be voted in the presence of the notary public or other officer and deposited and sealed in the envelope and the notary must place his signature and title on the envelope.
357-64	Oct 16	DIVISION OF FINANCE. BANKS.	Articles of Incorporation of Scott City Bank and Trust Company.
359-64	Nov 18	FOREIGN COUNTRIES. FORFEITURES. ALIENS.	Section 442.580, RSMo 1959, does not prohibit a foreign government from acquiring, holding, or owning real estate in the State of Missouri.

		REAL ESTATE.	
360-64	Nov 25	PUBLIC OFFICERS. OFFICERS. NONPARTISAN COURT PLAN. JUDICIAL COMMISSIONS. CONSTITUTIONAL LAW. RESIDENCE. DOMICILE.	Person elected to nonpartisan Circuit Judicial Commission residing within such district at the time of election who later removes his residence to a place not within such district is not qualified to continue as a member of such Circuit Judicial Commission.
361-64	Nov 16	JUNIOR COLLEGE DISTRICT. TAXATION. STATE TAX COMMISSION. PUBLIC UTILITIES. RAILROADS. SCHOOLS.	The property of public utilities enumerated in Chapters 151, 153, and 155, RSMo, is subject to 1964 taxation by the Junior College District of Metropolitan Kansas City to the same extent as other property in the district. The State Tax Commission has the duty of apportioning the valuation of such utilities to the junior college district for 1964 taxation and is authorized to obtain the necessary information for such purpose.
363-64	Dec 22		Opinion letter to Mr. George G. Hatsell
365-64	Dec 7	HOSPITAL DISTRICT. COUNTY COLLECTOR. TAX FUNDS.	County Collector may turn over tax funds collected for hospital districts to the hospital district.
367-64	Oct 28		Opinion letter to Dr. Earl Dawson
368-64	Oct 29	INSURANCE.	Acceptance of regular life insurance law by United Mutual Insurance Company, an assessment plan company.
371-64	Dec 3	INSURANCE.	Articles of Incorporation of Universal Underwriters Life Insurance Company.
374-64	Nov 24	INSURANCE.	Articles of Incorporation of First Equity Life Insurance Company of Missouri.
375-64	Nov 16		Opinion letter to Mr. Harold Owens
377-64	Dec 9	COUNTY COURTS. COUNTY DEPOSITARIES. COUNTY FUNDS.	The County Court of Ste. Genevieve County under Section 110.180, RSMo 1959, may designate an additional bank as a depository at a time other than at the May term in an odd-numbered year.
380-64	Dec 4	RESTAURANTS. MEALS. MEAT.	A hamburger or other meat sandwich may be considered a ready-to-eat meal, sold as a unit, and the meat therein sold for consumption elsewhere than on the premises is not required by Section 413.275 to

		WEIGHTS AND MEASURES.	be sold by weight.
383-64	Nov 24		Opinion letter to the Honorable Hugh J. White
384-64	Dec 9		Opinion letter to the Honorable Warren E. Hearnese
385-64	Nov 18		Opinion letter to the Honorable Charles G. Hyler
388-64	Dec 31	INSURANCE. MUTUAL COMPANIES. POLICYHOLDERS. SURPLUS.	Advances or loans to a Surplus As Regards Policyholders of a mutual insurance company should be paid before any part of said surplus is distributed to the policyholders as owners of the mutual company.
389-64	Dec 7	COUNTY COURTS. JOHNSON GRASS. SURPLUS FUNDS.	A special fund for the eradication of Johnson Grass may be transferred to the general revenue fund, or to such other fund as may be in need of such balance, upon the termination of a county as a Johnson Grass Extermination Area.
394-64	Dec 22	COUNTY AUDITOR. CREATION OF THE OFFICE IN SECOND CLASS COUNTIES. VACANCY.	The office of county auditor is created and vacant on January 1, 1965, in St. Charles County. The Governor may fill the said vacancy.
396-64	Dec 10	CONSTITUTIONAL LAW. FINE ARTS. CULTURE.	Proposed legislation relating to the establishment of the Missouri State Council on the Arts and defining the council's powers and duties does not violate the provisions of the Constitution of Missouri prohibiting the granting, giving or lending of public money, property or credit to private persons, associations or corporations.
397-64	Dec 11	PUBLIC ADMINISTRATOR. SCHOOL BOARDS. COUNTY SCHOOL BOARDS.	Person may hold office of public administrator and be a member of the county school board at the same time.
400-64	Dec 10		Opinion letter to the Honorable Peter J. Grewach
401-64	Dec 17		Opinion letter to the Honorable Charles H. Baker
403-64	Dec 15		Opinion letter to the Honorable F. M. Brady
407-64	Dec 10		Opinion letter to the Honorable Robert E. Yocom
411-64	Dec 11		Opinion letter to the Honorable Brunson Hollingsworth
413-64	Dec 31		Opinion letter to the Honorable E. J. Cantrell
415-64	Dec 29	SCHOOLS.	As regards to the University of Missouri and its branches, Lincoln

		STATE UNIVERSITY. STATE COLLEGES.	University and the five state colleges, that: 1. Under the Constitution and Statutes of Missouri a graduate of an accredited high school does not have an absolute legal right to be admitted. 2. The governing boards of these institutions have the authority to set by rules and regulations admission requirements which are reasonable and not arbitrary. 3. The provisions of neither Article IX, Section 1(a), Missouri Constitution of 1945, nor Section 160.090(2), RSMo 1959, prevent the governing boards of these institutions from adopting reasonable and nonarbitrary admission requirements.
416-64	Dec 14	INSURANCE.	Acceptance of regular life insurance law by Manchester Life Insurance Company, a stipulated premium plan company.
423-64	Dec 16		Opinion letter to Mr. O. E. Pettijohn
433-64	Dec 29	INSURANCE.	Articles of Incorporation of Kennedy National Life Insurance Company.

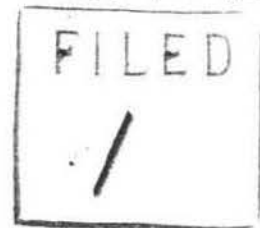
HOSPITAL.
COUNTY HOSPITALS:
PROSECUTING ATTORNEYS:
ATTORNEYS:
COUNTIES:

It is the duty of the prosecuting attorney to advise the county court and the Board of Trustees of a county hospital concerning all legal matters involving the hospital. It is the duty of the prosecuting attorney to collect delinquent bills owed such hospital. The county court may authorize the prosecuting attorney to employ associate counsel if suits are instituted for the collection of such accounts outside the county in which the hospital is located or outside the State of Missouri.

June 24, 1964

Opinion No. 1 (1964)
Opinion No. 464 (1962)

Honorable Frank Conley
Prosecuting Attorney
County of Boone
Columbia, Missouri



Dear Mr. Conley:

This is in answer to your request for an opinion of this office as to the authority of the Boone County Hospital to employ a private attorney to perform certain legal services for the hospital.

Your question is whether either the Board of Trustees of the hospital or the county court may employ an attorney on a time and expense basis or on a contingent fee basis to collect delinquent accounts owed the hospital:

- a. Where the defendant resides in the County of Boone.
- b. Where the defendant resides outside the County of Boone.
- c. Where the defendant resides outside the State of Missouri.

You also ask whether the Board of Trustees or county court may employ an attorney other than the prosecuting attorney to give legal advice and assistance in matters other than the collection of accounts including but not limited to such matters as:

- a. Preparation and advice as to contracts.
- b. Preparation and advice with respect to notes, deeds of trust, chattels, examination of abstracts of title and other instruments.
- c. Preparation of other legal documents.
- d. Defense of or the filing of suits involving the affairs of the Boone County Hospital.

Enclosed herewith is a copy of an opinion of this office rendered on March 5, 1953, to the Honorable Curt M. Vogel, Prosecuting Attorney for Perry County. In this opinion, we stated that absent an enabling statute, neither the Board of Trustees of a county hospital subject to Sections 205.160 to 205.340, RSMo 1949, nor the county court in counties in which such hospitals are located is authorized to employ a private attorney for the performance of services which the prosecuting attorney is required by law to perform.

In this opinion, we examined the duties of the prosecuting attorney required by Section 56.060 and 56.070, RSMo 1949, and held that such duties included the collection of delinquent accounts for a county hospital and advising the Board of Trustees of the hospital on all legal matters connected therewith. We therefore concluded that neither the Board of Trustees of a county hospital subject to Sections 205.160 to 205.340, RSMo 1949, nor the county court in counties in which such hospitals are located may employ a private attorney to advise the trustees on legal matters affecting the county hospitals or to collect delinquent accounts owed the hospital by persons residing within the jurisdiction of the prosecuting attorney of the county in which the hospital is located, but must rely on the prosecuting attorney to render such legal services to the hospital without fee. While the 1959 revision of the statutes reworded Section 56.060 and 56.070, no change in meaning was intended or effected.

However, the answer to points (b) and (c) of your first question depends upon the duty of a prosecuting attorney to file civil actions against persons residing outside the county or outside the state. The general rule is that in the absence of statutes extending the territorial jurisdiction of prosecuting attorneys, their powers and duties are ordinarily confined to their respective counties or districts. 27 C.J.S., District and Prosecuting Attorneys, Section 12(4), page 660; 14 Am. Jur., Counties, Section 31, page 203.

The duties of the prosecuting attorney in this state are set out in Sections 50.060 and 50.070, RSMo 1959. Section 50.060 requires the prosecuting attorney to " * * * commence and prosecute all civil and criminal actions in his county in which the county or state is concerned, defend all suits against the state or county, and prosecute forfeited recognizances and actions for the recovery of debts, fines, penalties and forfeitures accruing to the state or county. In all cases, civil or criminal in which changes of venue are granted, he shall follow and prosecute or defend, as the case may be, all the causes, for which, in addition to the fees now allowed by law, he shall receive his actual expenses."

Section 56.070 states, among other things, that the prosecuting attorney shall represent generally the county in all matters of law. Our study of the long history of these sections pertaining to duties of prosecuting attorneys reinforces our construction of the meaning of these statutes.


It is our opinion that the territorial restrictions of the first clause in Section 56.060 are broadened by the provisions of the second and third clauses which do not contain the words "in his county". The third clause provides that "each prosecuting attorney shall * * * prosecute * * * actions for the recovery of debts * * * accruing to the state or county." This clause contains no restriction on the area in which the prosecuting attorney may act to recover debts accruing to the county. A debt owed to the county hospital would be considered a debt owed to the county. An action to recover a debt is transitory and jurisdiction lies wherever the debtor may be found. The prosecuting attorney is the attorney for the county, Section 56.070, and we believe Section 56.060 requires him to prosecute the debtor wherever jurisdiction will lie. Since he may prosecute cases outside his county, there is no reason why he may not prosecute cases outside the state. Therefore, it is our opinion that it is the duty of the Prosecuting Attorney of Boone County to prosecute suits to recover delinquent accounts owed the Boone County Hospital by persons residing outside Boone County or outside the State of Missouri. Of course, we know as a practical fact that in suits prosecuted outside the state and sometimes outside the county associate counsel is needed and sometimes mandatory. In such situations the prosecuting attorney should secure the authority of the county court to employ such associate counsel.

CONCLUSION

It is the duty of the prosecuting attorney to advise the county court and the Board of Trustees of a county hospital concerning all legal matters involving the hospital. It is the duty of the prosecuting attorney to collect delinquent bills owed such hospital. The county court may authorize the prosecuting attorney to employ associate counsel if suits are instituted for the collection of such accounts outside the county in which the hospital is located or outside the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

Opinion No. 214(63)
4(64)
Ans. by Letter (Stephan)

April 10, 1964

Honorable Joe R. Ellis
Prosecuting Attorney
Barry County
Cassville, Missouri



Dear Mr. Ellis:

This is in response to your request for an opinion of this office as to whether the salaries of deputy recorders in Barry County are to be set by the circuit court or by the county court.

Barry County is a county of the third class in which the offices of circuit clerk and recorder are combined. Under the provisions of Section 483.345, RSMo 1959, the circuit court in third class counties has clear authority to "fix the compensation of such deputies . . ." as are appointed by the circuit clerk.

Pursuant to our request, you forwarded a copy of the order of the circuit court setting the salaries of the employees of the office of clerk-recorder of Barry County. That order reads in part as follows:

"Now on this day appears Artie Spain, Circuit Clerk and Ex-Officio Recorder of Deeds of Barry County, Missouri, and requests the above Court to set the salaries of the Circuit Clerk's Deputies in and for Barry County, Missouri.

"WHEREUPON, it is hereby ordered, decreed and adjudged by the Court that the salary of Deputy Circuit Clerk, Barbara Lacey, in and for Barry County, Missouri, shall be the sum of \$225.00 per month until changed by further order of this Court; and it is further ordered by the Court that the salary of Deputy Circuit Clerk and Recorder of Deeds, Frances Terry, in and for said County shall be \$190.00 per month; and it is further ordered by the

Court that the salary of Deputy Circuit Clerk and Recorder of Deeds, Lois Lechner, in and for said County shall be \$190.00 per month; beginning as of January 1, 1964, and continuing until such time as this order may be changed by further order of this Court."

According to the order, all of the employees named therein hold a position of deputy circuit clerk. Inasmuch as Section 483.345 places no limitation upon the number of deputy circuit clerks, we believe that all of the employees in question may have their salaries properly set by the circuit judge insofar as they hold the position of deputy circuit clerk.

It is, therefore, the opinion of this office that the salaries in question have been properly set and each of the named employees is entitled to the monthly compensation specified in the order.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS/dg

MAGISTRATES:
MAGISTRATE COURT:
REMISSION OF FINE OR SENTENCE:
EXECUTION - STAY OF:
JUDGMENT OF CONVICTION:
SUSPENSION OF IMPOSITION OF SENTENCE:
SUSPENSION OF EXECUTION OF SENTENCE:
PAROLE:
PROBATION:

1. A magistrate judge may not remit a portion of a fine or a sentence of imprisonment previously imposed nor may he set aside a judgment of conviction previously imposed.
2. Magistrate courts may grant a stay of execution for a period of not more than six months at the expiration of

which the defendant must comply with the sentence. A bond is required during the period that execution is stayed.

3. The magistrate court may grant a stay of execution for purposes of appeal for so long as is necessary until the judgment becomes final. A bond is also necessary under these circumstances.

4. All magistrate courts and the St. Louis Court of Criminal Correction do have the power to suspend either the imposition or the execution of sentence following a conviction of a misdemeanor. In so doing, the judge may place the defendant on probation.

5. Magistrate courts and the St. Louis Court of Criminal Correction are empowered to grant paroles to persons who are imprisoned pursuant to a conviction in said courts and prior to the expiration of the term of the sentence.

September 23, 1964

OPINION NO. 6 (1964)



Honorable Hugh H. Waggoner
Superintendent
Missouri State Highway Patrol
Highway Patrol Building
Jefferson City, Missouri

Extra copies in vault

Dear Colonel Waggoner:

This is in answer to your request for an opinion of this office reading in part as follows:

"There have been some recent questions as to whether a magistrate judge has the authority to remit fine or to set aside a judgement."

Magistrate courts are courts of limited jurisdiction and they have only those powers given to them by the constitution and the legislature. American Life Insurance Co. v. Morris, Mo.App., 281 S.W. 2d 601; State v. Sestric, 349 Mo. 182, 159 S.W. 2d 786. There is no authorization in the constitution or in our statutes for a magistrate to remit or set aside a judgment. The magistrate judges are therefore without such powers.

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We deem it advisable to consider the effect of various statutes and Supreme Court Rules in order to determine the present state of the law on the powers of magistrate courts.

Section 543.290(4), RSMo 1959, empowers magistrate judges to grant a stay of execution "in any case and upon such conditions as in his discretion may meet the needs of justice." This apparent power to grant an unlimited stay of execution has been supplanted by Supreme Court Rule 22.12, which authorizes a magistrate to grant a stay of execution only for purposes of appeal or in accordance with the procedure set out in Supreme Court Rule 27.24.

Supreme Court Rule 27.24 authorizes a stay of execution following conviction in a misdemeanor case "for good cause shown", but the period of said stay is limited to six months. Further, the defendant is required to post a bond conditioned upon his surrendering himself on the proper date for execution of the sentence. This court rule applies to situations in which the court desires to allow the defendant a period of time not exceeding six months in which to raise money to pay a fine, prepare his affairs prior to imprisonment, or for some other good reason. It is clear, though, that this rule contemplates that the sentence shall be executed upon the expiration of the stay.

On the other hand, there is nothing in the rules which imposes a time limitation upon the stay of execution granted for purposes of appeal as provided in Supreme Court Rule 22.12. Such a stay may be granted until such time as the judgment and conviction becomes final on appeal. A bond must also be filed in this situation.

All magistrate courts except those in first class counties under charter form of government are empowered by Section 549.193, RSMo 1959, to grant judicial probation or parole in the same manner as are the circuit courts. Section 549.197, RSMo 1959, grants the same powers to magistrate courts in first class charter counties as does Section 549.061, RSMo Cum. Supp. 1963, to the St. Louis Court of Criminal Correction.

The power of judicial probation and parole is covered by Chapter 549, RSMo Cum. Supp. 1963. The powers of circuit courts and magistrate courts respecting judicial probation and parole are identical under this chapter and, hence, is applicable to magistrate courts. Section 549.071, RSMo Cum. Supp. 1963, provides:

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"1. When any person of previous good character is convicted of any crime and commitment to the state department of correction or other confinement or fine is assessed as the punishment therefor, the court before whom the conviction was had, if satisfied that the defendant, if permitted to go at large, would not again violate the law, may in its discretion, by order of record, suspend the imposition of sentence or may pronounce sentence and suspend the execution thereof and may also place the defendant on probation upon such conditions as the court sees fit to impose.

"2. The courts, subject to the restrictions herein provided, may, in their discretion, when satisfied that any person against whom a fine has been assessed or a jail sentence imposed, will, if permitted to go at large, not again violate the law, parole the defendant upon such conditions as the court sees fit to impose."

Thus, pursuant to Section 549.071(1), RSMo Cum. Supp. 1963, magistrate courts may suspend the imposition of sentence upon persons convicted in their courts or may pronounce sentence and suspend the execution thereof. In either case the court may also place the defendant upon probation upon such conditions as the court sees fit to impose. If either the imposition or the execution of sentence is suspended, the defendant is not liable for service of any term of imprisonment or payment of a fine, unless, of course, the defendant has been placed on probation and probation should be revoked. If the court sees fit to retain jurisdiction by placing the defendant on probation, then Section 549.111, RSMo Cum. Supp. 1963, contemplates a final discharge of the judgment upon the satisfactory performance of the conditions imposed by the court.

Section 549.071(2), RSMo Cum. Supp. 1963, authorizes magistrate courts to grant a parole to a defendant upon such conditions as the court sees fit to impose. Since Section 549.058(2), RSMo Cum. Supp. 1963, defines parole to mean the release of one already imprisoned prior to the expiration of his term, Section 549.071(2) means that magistrate courts may grant a parole and thereby release persons imprisoned in the county jail as a result of convictions in said courts.

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Here, also, a discharge by the court of a defendant previously placed on parole operates as a complete satisfaction of the original judgment. Section 549.111, RSMo Cum. Supp. 1963.

CONCLUSION

It is, therefore, the opinion of this office that:

1. A magistrate judge may not remit a portion of a fine or a sentence of imprisonment previously imposed nor may he set aside a judgment of conviction previously imposed.
2. Magistrate courts may grant a stay of execution for a period of not more than six months at the expiration of which the defendant must comply with the sentence. A bond is required during the period that execution is stayed.
3. The magistrate court may grant a stay of execution for purposes of appeal for so long as is necessary until the judgment becomes final. A bond is also necessary under these circumstances.
4. All magistrate courts and the St. Louis Court of Criminal Correction do have the power to suspend either the imposition or the execution of sentence following a conviction of a misdemeanor. In so doing, the judge may place the defendant on probation.
5. Magistrate courts and the St. Louis Court of Criminal Correction are empowered to grant paroles to persons who are imprisoned pursuant to a conviction in said courts and prior to the expiration of the term of the sentence.

The foregoing opinion, which I hereby approve, was prepared by my assistant, James J. Murphy.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

March 2, 1964



Honorable Bill D. Burlison
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Mr. Burlison:

This is in answer to your letter in which you ask several questions regarding the "Riverside Regional Library." You state that the county library districts of Cape Girardeau, Scott and Perry Counties and the city library of Perryville, Missouri, have contracted with each other under the provisions of Section 70.210 to 70.360, RSMo, for cooperative services as "The Riverside Regional Library".

You ask six questions regarding the power and authority of such so-called regional library to purchase real estate for the use of such regional library.

Your first question is whether "Riverside Regional Library" can purchase real estate and incur indebtedness therefor in an amount less than the yearly gross income of such regional library but in an amount greater than the yearly income of one or more of the individual contracting libraries. As you pointed out, the so-called regional library came into existence as a matter of contract between the various county library district boards and the city library board under provisions of Sections 70.210 to 70.320. Such regional library does not have any other existence than the result of the contract between such libraries and does not exist as a statutory political or other subdivision.

Section 70.240 and Section 70.250, RSMo, provide as follows:

"70.240. Lands may be acquired--how.--
The parties to such contract or cooperative

Honorable Bill D. Burlison

action or any of them, may acquire, by gift or purchase, or by the power of eminent domain exercised by one or more of the parties thereto in the same manner as now or hereafter provided for corporations created under the law of this state for public use, chapter 523, RSMo, and amendments thereto, the lands necessary or useful for the joint use of the parties for the purposes provided in section 70.220, either within or without the corporate or territorial limits of one or more of the contracting parties, and shall have the power to hold or acquire said lands as tenants in common.

(Emphasis added.)

"70.250. Method of financing.--Any such municipality or political subdivision may provide for the financing of its share or portion of the cost or expenses of such contract or cooperative action in a manner and by the same procedure for the financing by such municipality or political subdivision of the subject and purposes of said contract or cooperative action if acting alone and on its own behalf."

Section 70.240 confers no power on the so-called regional library to hold real estate. Such statute provides that the parties to the cooperative action or contract or one party to the cooperative action or contract may acquire land and where more than one of such parties to the contract or cooperative action acquire land to be used by the parties to the cooperative action or contract, title to such land is to be taken by such parties as tenants in common.

Section 70.250 makes plain that each party to the contract which makes a purchase can do so only in the manner and by the same procedure as if such party were purchasing the property alone. Therefore, the so-called regional library cannot acquire land in its name as a regional library as though it were a legal entity, but one or more of the parties to the contract creating such "regional library" may acquire land and if two or more of such contracting parties do acquire land they hold title to such land as tenants in common.

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The next five questions in your request are apparently based on the assumption that the regional library does have power to purchase land. Since we have ruled otherwise in answer to your first question, it becomes unnecessary to answer questions two through six.

However, we believe that you are fundamentally concerned with the question of how the individual library boards may make the purchase of the land to be used for library purposes and to be held as tenants in common.

We further assume that you are concerned with the right of your county library district to make this purchase, because you as prosecuting attorney would have no official duties regarding the city library of Perryville, Missouri.

Section 26(a) of Article VI of the Constitution of Missouri provides as follows:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution."

Section 182.070 provides that a county library district is a body corporate. Such county library district would, therefore, be a political corporation and would be prohibited by the provisions of Section 26(a) of Article VI of the Constitution from becoming indebted in an amount greater than the current year's revenue, plus unencumbered balances from prior years except as provided in the Constitution. The provision of Section 26(a) of Article VI of the Constitution reading, " * * * except as otherwise provided in this constitution" refers to other provisions of Section 26 of Article VI of the Constitution, which authorize the incurring of indebtedness in an amount greater than the current year's revenue and unencumbered balances from prior years by a two-thirds vote of the electors in the county, city, incorporated town or village, school district or other political corporation or subdivision which wishes to incur the debt.

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Section 182.070 provides in part as follows:

"The county library district, as a body corporate, by and through the county library board of trustees, may sue and be sued, complain and defend, and make and use a common seal, purchase, or lease grounds, purchase, lease, occupy or erect an appropriate building for the use of the county library and branches thereof out of current funds if such funds are available above those necessary for normal operations or, as provided in section 182.105, * * *"

(Emphasis added.)

Under the provisions of such section the county library district may lease or purchase grounds or buildings out of current funds, or may issue bonds for such purposes under provisions of Section 182.105, RSMo. Current funds are those voted by electors of the county library district under provisions of Section 182.010 and 182.100, RSMo. Section 182.020 provides that taxes for the levy authorized by the voters under Section 182.010 shall be disbursed by the county treasurer only on warrants of the county library board, and Section 182.100 provides that building taxes authorized by such section shall be disbursed only by the county treasurer on warrants of the county library board.

Sections 182.020, 182.100 and 182.105 are the only sources of funds for county library boards to acquire lands or buildings for library purposes. If the funds raised from a levy under one of such sections are insufficient to finance a building or the district's part thereof, additional funds may be raised under any of such sections.

We construe your question numbered three to be whether the county library board may purchase land either alone or as a tenant in common with other parties to the "Regional Library" contract by signing a promissory note and giving a deed of trust on the real property. It is our view that the county library district board cannot execute a promissory note and deed of trust for land or for a building or for its share of such land or building to be used for library purposes. Section 182.070,

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supra, sets forth the power of a county library board, and under such section the county library board can purchase land or buildings only from current funds or from moneys derived from a bond issue and may make payment from current funds only by warrant. We are unable to find any authority in the statutes giving a county library district board power to execute a promissory note and a deed of trust securing such note for any purpose, and in the absence of statutory authority such board has no power to do so. The rule regarding the power of public bodies is tersely stated in Volume 67, C.J.S., §107, p. 378, as follows:

"The powers and authority of boards, commissions, and other public bodies are usually defined and limited by law. Boards, commissions, and other public bodies have only such power and authority as are expressly conferred by law or as arise from necessary implication, and any power sought to be exercised must be found within the four corners of the statute under which they proceed. * * *"

You also inquire as to the right of a county library district board to enter into a "lease purchase agreement". We assume that this is a "lease purchase" providing for payment over a number of years of an amount greater than the present unencumbered "current funds". We are enclosing an opinion rendered under date of October 14, 1949, to Paxton Price, which answers this question. Section 182.105 authorizing issuance of bonds by a county library district has been enacted since such opinion was written, but the holding in such opinion is still applicable insofar as a "lease purchase" contract is concerned.

In view of the above holding, we believe it is apparent that title should be taken as tenants in common to the real property by the county library districts which are signatories to the contract creating the "Regional Library" and which districts do purchase the real property in such proportion as such county library districts contribute to the purchase price of such real property.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

February 14, 1964

Opinion No. 363 (1963)
No. 8 (1964)
Answered by letter

Mr. John W. Ridgeway
Deputy Commissioner of Finance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Ridgeway:

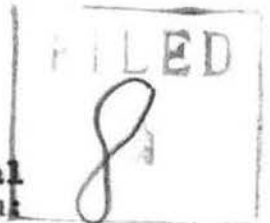
This letter of advice is written in lieu of a formal opinion touching the following question submitted by you:

"Are assigned accounts receivable within the language 'collateral security having an ascertained market value', as the same is found in Section 362.170(1) (b) RSMo 1959?"

That portion of Section 362.170 (1), (b), RSMo 1959, as amended, referred to in your question, contains a directive that certain described loans by banks be secured by "collateral security having an ascertained market value" equaling a designated percentage of the liabilities so secured.

In 1942 this office rendered an opinion bearing date of March 18, 1942, to D. R. Harrison, then Commissioner of Finance. Such opinion was addressed to the term "actual market value" as such term is used in Section 362.170 (1), (c) RSMo 1959, as amended, such cited subparagraph of the statute making reference to collateral security of warehouse receipts. A review has been made of definitions of "market value" set forth in the opinion of this office dated March 18, 1942, and such definitions have not changed to this date.

No court decision has been found specifically holding that accounts receivable have an "ascertained market value". As early as 1879, the St. Louis Court of Appeals held in *Bank of North America, Resp., v. Tamblin*, App., 7 Mo. App. 571, that a bank could take an assignment from a corporation of an account due to the corporation. The following language from *State ex rel. Globe-Democrat Publishing Company v. Gehner*, 316 Mo. 694, 1.c. 696, 294 S.W. 1017, demonstrates that accounts receivable are property:



Mr. John W. Ridgeway

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"Accounts receivable are amounts owing to a creditor on open account. [Newport Nat. Bank v. Herkimer Co. Bank, 225 U.S., 1.c. 184, 56 L.Ed. 1042]. They are in the nature of credits which, under the statute (Sec. 12967, R. S. 1919), include 'every claim or demand of money, interest or other valuable thing, due or to become due'. Thus defined they are declared by the statute above cited to be personal property. As such they are proper subjects of taxation within the limitations stated."

An ascertained market value is merely a "found" market value. While accounts receivable in various localities may be more or less difficult to determine they nevertheless have an "ascertained market value".

We enclose a copy of the opinion of this office referred to in this letter for your guidance. If you will acquaint this office with the character of accounts receivable mentioned in your inquiry we will be in a better position to advise you.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO/dg
Encl.

WORKMEN'S COMPENSATION: RE: Notice of levy for income taxes under
workmen's compensation.

TAXATION:

Opinion No. 11 (64)
Answered by letter.

February 28, 1964



Mr. Spencer H. Givens
Director
Division of Workmen's Compensation
Jefferson City, Missouri

Dear Mr. Givens:

This letter is in response to your request of August 20, 1963, for an official opinion of this office. You inquire:

"Is compensation due from an employer to an employee under the Workmen's Compensation Law (Chapter 287, RSMo 1959) subject to levy by the United States for income taxes claimed by the Internal Revenue Service, United States Treasury Department, to be due from the injured employee, who would otherwise be entitled to receive such compensation payments? In that connection attention is invited to the provisions of Section 287.260, RSMo 1959.

"Is the Notice of Levy, a photostatic copy of which is enclosed, legal and binding on the employer named therein?"

Section 287.260, RSMo 1959, to which you refer provides:

"The compensation payable under this chapter, whether or not it has been awarded or is due, shall not be assignable, shall be exempt from attachment, garnishment, and execution, shall not be subject to setoff or counterclaim, or be in any way

liable for any debt and in case of the insolvency of an employer or his insurer, or the levy of an attachment or an execution against an employer or insurer shall be entitled to the same preference and priority as claims for wages, without limit as to time or amount, * * *

The Notice of Levy of the Federal Internal Revenue Service enclosed with your request was made under authority of Section 6321 of the Internal Revenue Code of 1954, 26 U.S.C. §6321, which creates a lien in favor of the United States upon the taxpayer's property or right to property.

It is well established that the federal power to tax and to collect the tax is supreme and prevails over the state's power to exempt property from claims of creditors. State law cannot create an exemption from the collection of federal taxes. *Kieferdorf v. Commission of Internal Revenue*, 142 F2d 723, 725; *U.S. v. Heffron*, 158 F2d 657, 658; *Leuschner v. First Western Bank*, 261 F2d 705, 707.

Thus, the exemption provided by Section 287.260, RSMo 1959, does not prevent the federal tax authorities from levying on workmen compensation benefits. We do not, however, rule that workmen's compensation benefits are or are not subject to federal tax levy.

Although federal power to collect taxes prevails over state exemption laws, there are exemptions provided under the federal laws. For example, Section 6334 of the Internal Revenue Code, 26 U.S.C. §6334, provides such exemptions. It is our opinion that whether or not workmen compensation benefits come within any federal exemption is a question to be determined by the courts through an adversary proceeding involving proper parties-in-interest.

Your request in effect asks us to rule how the federal tax levy affects the rights and liabilities of the employer and the employee and also the federal government. This we cannot and should not attempt. First, as explained supra, the scope of federal tax exemptions should be determined by court action. Second, the validity of any levy and its effect on the parties can only be determined upon a case by case basis. The employee may have defenses to the collection of the tax. The employer may have obligations to give notice and raise defenses which the employee may have. The relative rights of the parties can only be determined upon the operative facts. Such facts vary in each case.

Mr. Spencer H. Givens

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Furthermore, the relative rights and duties affected by the tax levy are between the employer, employee and the federal tax authorities. We have attempted, but fail to see how the Workmen's Compensation Commission is legally affected by the federal levy. Thus, it is not a party-in-interest to the issues. It is our opinion that the Commission is not a proper party to either litigate or determine these issues but that the legal consequences of a notice to levy is a matter to be resolved between the employer, the employee and the federal tax authorities.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

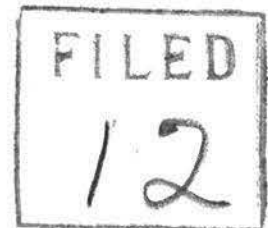
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INDUSTRIAL DEVELOPMENT:
MUNICIPALITIES:
CITIES:
TAXATION:

A municipality which owns a manufacturing or industrial facility developed under Section 71.790 to 71.850, RSMo 1963 Cum. Supp., may not require a tenant thereof, as part of the leasing agreement, to pay monies in lieu of taxes to another taxing body.

OPINION NO. 12 (1964)

June 22, 1964



Mr. Lawrence A. Schneider, Director
Commerce and Industrial Development Division
Eighth Floor, Jefferson Building
Jefferson City, Missouri

Dear Mr. Schneider:

This is in response to your request for an opinion as follows:

"Can a manufacturer agree to pay (or give) a regular amount of money [in lieu of taxes] to a municipality, or county government, or school district? If so, can this regular gift be previously agreed to by a written contract or agreement?"

You indicate that the opinion request was prompted because House Bill No. 576, which would have specifically covered this situation and permitted it, failed of passage in the 72nd General Assembly.

The subject matter of your request pertains to those facilities constructed and leased by municipalities for the purposes of attracting manufacturing and industrial concerns under Section 71.790 to 71.850, RSMo 1963 Cum. Supp. (The Industrial Development Act),

When a municipality constructs industrial facilities, the real estate is not taxable by any political entity, hence if agreements could be made for the lessee of the industrial plant to pay to the city a sum of money which could be paid by the city to other taxing authorities or could be paid directly by the lessee to other taxing authorities this would relieve some of the tax burden of those entities because of the removal of the

real estate from the tax rolls. There are good arguments for so doing. The problem is - does the law authorize such arrangements or agreements.

The general language of the Industrial Development Act does not contain any express statutory grant of authority for the city to enter into an agreement by which municipal funds are to be given to various other taxing authorities.

Section 432.070, RSMo 1959, states that contracts by cities may only be made when authorized by law. This section reads as follows:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

While there is no case directly in point, that of Arbyrd Compress Co. v. City of Arbyrd, App., 246 S.W. (2d) 104, holds that an agreement to pay a certain amount yearly for taxes and assessments was void because of the lack of authority on the part of the officers of the city to make such a contract. In that case, the plaintiff's property was excluded from the limits of the defendant city by the county court. Thereafter, the city brought an action to review the judgment. Upon the completion of an agreement by the plaintiff to pay a certain amount yearly for taxes and assessments to the city if his land was excluded from the limits of the city, the city dismissed its action and consented to the judgment. The contract was found to be violative of Section 432.070, RSMo 1949.

There being no express legislative authorization as required by Section 432.070, a municipality does not have the power to enter into a contract providing for the payment of municipal funds derived from the lease of industrial development projects to other taxing authorities. This view is buttressed by the failure of the 72nd General Assembly to pass House Bill No. 576, which would have authorized such practices.

Mr. Lawrence A. Schneider

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CONCLUSION

Therefore, a municipality which owns a manufacturing or industrial facility developed under Section 71.790 to 71.850, RSMo 1963 Cum. Supp., may not require a tenant thereof, as part of the leasing agreement, to pay monies in lieu of taxes to another taxing body.

The foregoing opinion, which I hereby approve, has been prepared by my assistant, Thomas E. Eichhorst.

Very truly yours,



THOMAS F. EAGLETON
Attorney General

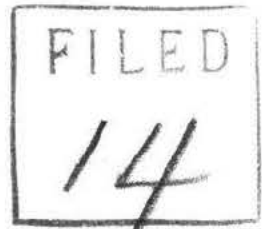
SCHOOLS & SCHOOL DISTRICTS: When, does the present terms of the County Board of Education of a third class County expire, under the provisions of paragraph four (4) of the new section 165.657?

COUNTY BOARDS OF EDUCATION: In third class Counties with two (2) County Court Districts, and under the provisions of paragraph five of said statute, may the voters in one County Court District vote on candidates in the other County Court District? Does the Legislature have the power to terminate or shorten the term of a properly elected and serving County School Board member?

January 10, 1964

Opinion No. 360
1963

Honorable Darold W. Jenkins
Prosecuting Attorney
Saline County
Marshall, Missouri



Dear Mr. Jenkins:

This opinion is rendered in response to your request of August 27, 1963, for an official opinion of this office. Your inquiry, which relates to Senate Bill No. 327 of the 72nd General Assembly which repealed and re-enacted Section 165.657, RSMo, is threefold:

1. "When . . . do the present terms of the County Board of Education of a third class County expire, under the provisions of paragraph four (4) of the new section 165.657?"
2. " . . . in third class Counties with two (2) County Court Districts, and under the provisions of paragraph five (5) of said statute, may the voters in one County Court District vote on candidates in the other County Court District?"
3. "Does the Legislature have the power to terminate or shorten the term of a properly elected and serving County School Board member?"

I.

Your first and third inquiries are closely related, hence we shall discuss them together.

Honorable Darold W. Jenkins

The County Board of Education set up by Section 165.657, RSMo 1959, is a creature of the Legislature. As such, the Legislature may modify or abolish it as may seem necessary unless prohibited by the Constitution.

"In this state our courts always have recognized and applied the doctrine supported by the great weight of authority in America that no one can acquire a vested right in an office established by the legislative department of a state or municipality. All offices are created for the public good, and the rights of their incumbents are subordinate and inferior to that prime object. The power to create, unless restrained by law, includes the power to abolish, and an officer elected or appointed even for a definite term takes office with the implied understanding that the power which created the office may abolish it before the expiration of his term, in which event he will find himself out of office. * * *" Sanders v. Kansas City, 162 SW 663, 665.

Accord: State ex rel. Tolerton v. Gordon, 236 Mo. 142, 139 SW 403, 407; Higginbotham v. Baton Rouge, 306 U.S. 535, 538. Thus, the Legislature has the power to end the terms of County Board of Education members serving under Section 165.657, RSMo 1959.

The prior law, Section 165.657, RSMo 1959, created in all counties boards of education of identical membership, terms, and method of selection. Under Section 165.657, RSMo 1959, a six-member County Board of Education was selected by the members of the school district boards. Two members were selected each year to serve a three year term. This same scheme was used in every county.

Senate Bill No. 327 substantially changes this statute. It sets up not one scheme to be used in all counties but two schemes, one for counties of the first class (Senate Bill No. 327, §§ 1-3), another scheme for counties of the second, third and fourth class (Senate Bill 327, §§ 4-7). The scheme to be used in first class counties is substantially a continuation of the scheme the prior law applied to all counties.

Honorable Darold W. Jenkins

However, the new scheme to be used in second, third, and fourth class counties is significantly different. The new scheme provides for boards of education elected by popular vote. This radically departs from the method of selection used under the prior law. The significance of this change is manifest by the section of the Act which provides for the entire membership of the board to be elected at the next annual school election Senate Bill No. 327, §5.

Although the existing boards of education in second, third and fourth class counties are not abolished by express words of Senate Bill No. 327, this is its necessary implication. The new law provides for the selection of the entire membership of the board by a fundamentally different method, popular vote. We therefore conclude that Senate Bill No. 327 creates new boards of education in all second, third and fourth class counties and that the prior boards cease to exist with the election of the new boards "at the annual school election next following the effective date of this act"; namely, April 7, 1964.

We note one exception to the above conclusion. Senate Bill No. 327, §7 provides:

"7. In the event there is only one school district in any county, the board of education for that district shall serve as the county board of education."

Thus, in counties to which section seven, supra, applies, the old county board of education ceases to exist on the effective date of Senate Bill 327 and the school district board serves as the county board.

II

We turn now to your second inquiry, to wit: under Senate Bill No. 327, §§ 4-7 may the voters of one county court district vote on candidates to be elected from the other county court district? For convenient reference, we shall here set out the provisions of sections four and five of Senate Bill No. 327, to wit:

"4. There is created in each second, third and fourth class county in this state a county board of education whose members shall be elected by popular vote at the annual school election held on the first Tuesday in April in each year. Each member shall be a citizen of the United States and of the State of Missouri;

Honorable Darold W. Jenkins

a resident householder of the county, and shall be not less than twenty-four years of age. Nominations for board members shall be filed with the secretary of the county board of education at least thirty days before the election. The county board of education shall prepare ballots and publish notice for such election in the same manner as for boards of education in school districts.

"5. At the annual school election next following the effective date of this act, six members shall be elected whose terms shall be determined at the first meeting of the board subsequent to the election as follows: In each county court district the member receiving the highest number of votes shall serve for three years; the member receiving the next highest number of votes shall serve for two years, and the member receiving the least number of votes shall serve for one year. Thereafter each member shall serve for three years. Not more than three members shall be elected from one county court district.

Senate Bill No. 327, §§ 4 and 5, creates in each county of the second, third and fourth class a county board of education of six members to be elected by popular vote. Senate Bill No. 327, §§ 4 and 5, expressly provides that a six-member board shall be elected by popular vote and that not more than three of the six members shall be elected from each county court district. But nowhere is there an express provision as to whether the voters of one county court district shall vote upon the candidates from both districts or only upon those candidates to be elected from their district. The intention of the Legislature, which is determinative of the meaning of this and every statute, is not found here in the express words of the statute. Therefore, it must be found by analysis of the other provisions of the new law and the prior law in light of reason and the rules of statutory construction.

We are of the opinion that the intention of the Legislature manifest in Senate Bill 327, §§ 4-7, is that the voters in each county court district shall vote only on those candidates for

membership on the county board of education to be elected from their district and not those to be elected from the other county court district.

As we have noted supra, Senate Bill No. 327 sets up two distinct schemes, one for first class counties, the other for second, third, and fourth class counties. In the first scheme of the new law we find the limitation, "Not more than three members of the board shall reside in any county court district". (Emphasis added) Senate Bill No. 327, §2. Substantially the same words were used in the prior law. However, under the second scheme of the new law we find the limitation, "Not more than three members shall be elected from one county court district". (Emphasis added) Senate Bill No. 327, §5.

Obviously the limitation under the second scheme (second, third and fourth class counties) is not a requirement merely that three of the members be residents of each county court district. If the Legislature had intended merely a residence requirement, the words, "reside in", as were used in the prior law and the first scheme of the new law would have better expressed such an intent.

Furthermore, it is a rule of statutory construction that where language used in one section is different from that used in other sections of the same statute and different from that used in a prior statute, it is presumed that such language is used with a different intent. Wine v. Commonwealth, Mass, 17 N.E. 2d 545 [6]. The words, "reside in" and "elected from", manifest a difference in the first and second schemes of Senate Bill 327.

It is clearly expressed under the prior law and under the first scheme (first class counties) of the new law that all of the electors may vote on all of the members of the county board. Whether or not the same is true under the second scheme of Senate Bill No. 327 is your inquiry. Both of the schemes under the new law and the scheme of the prior law provided for county board members to be elected. In this respect all schemes are alike. Under the prior law and under the first scheme of the new law the electors are the members of the boards of the school districts. Under the second scheme of the new law, the electors are the people, i.e. a direct popular vote.

If under the second scheme (second, third and fourth class counties) of Senate Bill No. 327 all electors of the county may vote on all members of the county board, the sentence "Not more than three members shall be elected from one county court district", would be nothing more than a residence requirement, if that. But, we have already established that it is not. The words "elected from" are only consistent with the alternative construction; namely, that under the second scheme the electors

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of each county court district shall vote upon only the members of the county board to be elected from their district. The change of the words, "reside in", of the prior law to the words "elected from", of the new law are significant of the Legislatures intent. The one construction of Senate Bill No. 327, §§ 4-7, consistent with this intent is that three members of the county board shall be selected by the people of each county court district.

Senate Bill No. 327 limits each county court district to three of the members of the board. Under the first scheme each membership is voted upon separately, each being elected by a majority vote. However, under the second scheme if the members were selected by the voters of the entire county, those candidates who receive the greater number of votes may not always become the elected members. This is so because under the second scheme all members will be elected simultaneously. Let us illustrate the possible anomalous results by an example:

Assume: the candidates are A, B, C, D, E, and F, w, x, y, and z. Candidates A through F are from county court district one and candidates w through z are from district two. The total votes from each district are:

<u>Candidate</u>	<u>Votes District One</u>	<u>Votes District Two</u>	<u>Total</u>
A	None	1,200	1,200
B	500	600	1,100
C	700	310	1,010
D	950	50	1,000
E	600	300	900
F	500	300	800
w	700	None	700
x	100	500	600
y	400	50	450
z	10	400	410

Applying three-member limit to such a hypothetical election would mean: The members of the county board of education would be A, B, C from district one and w, x, and y from district two. A, though he received no votes in his own district was elected -- actually by the voters of district two. The converse is true of y. More voters in district one preferred D to represent them than any other candidate from that district, and more voters county wide preferred D than w, x, and y, yet, D does not become a member. Nor do ~~E~~ E and F become members although they received more votes than w, x, and y. Various other examples could

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be given of possible anomalous results occurring from members of the county board being elected by voters of the entire county.

If the candidates from each county court district are voted upon by the voters of their district, the members elected will directly relate to the votes they receive and it will not be possible for the voters of one district to elect the members from the other district. The anomalies discussed supra will not occur.

We are aware that if one county court district was substantially more populous than the other then the membership the board would not exactly represent the will of the majority of voters in the county. However, the three-member per county court district limitation of Senate Bill No. 327 §2 and §5, manifests a legislative intent that not only the interests of the majority but also the interests of each county court district are to be represented by the members of the county board. In our opinion, election of three members by each county court district better harmonizes with this intent and purpose.

One may foresee several possible abuses if the voters of one county court district could vote upon the members to be elected from the other district. For example: if one county court district was more populous than the other, as is the case in many counties having one large urban area, the larger district could select not only the members to be elected from their district but also the members to be elected from the other district. Or if the election were closely contested in one district, a minority in the other could control the membership of the board.

We also note ~~that~~ the provisions of Senate Bill No. 327, §5, for determining the duration of the initial terms. The opening phrase, "In each county court district * * *," of itself indicates a legislative plan of elections within each district.

We therefore, conclude that the Legislature in enacting Senate Bill No. 327, §§ 4-7 (applicable to second, third, and fourth class counties) intended that the voters of each county court district should elect three members from their district and that the members of the county board of education are not to be elected by a vote of the entire county.

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CONCLUSION:

Therefore, it is the opinion of this office that:

1. The Legislature has the power to abolish the county boards of education created by Section 165.657, RSMo 1959.

2. Senate Bill No. 327 of the 72nd General Assembly abolishes the county boards of education created by Section 165.657, RSMo 1959, in counties of the second, third and fourth class as of April 7, 1964, except as to those counties coming within §7, which are abolished as of the effective date of the Act.

3. In counties of the second, third and fourth class, under Senate Bill No. 327, §§4-7, the three members to be elected from each county court district shall be elected only by the voters of their respective districts and not by the voters of the county as a whole.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louis C. DeFep, Jr.

Yours truly,

THOMAS F. EAGLETON
Attorney General

LCD/dg

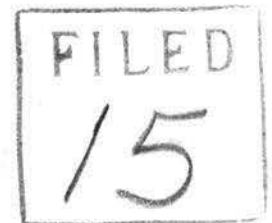
SOIL CONSERVATION
DISTRICTS AND
SUBDISTRICTS:
TAXATION:

(1) Federal, state and county lands are not to be considered in calculating the percentage of agreements necessary to carry out recommended soil conservation measures and proper farm plans from owners of not less than sixty-five percent of the lands situated in the subdistrict required by Section 278.250, Cum. Supp. 1963; (2) The subdistrict levy under Section 278.250, supra, is to be assessed only upon real estate; (3) Under Section 278.170, Cum. Supp. 1963, the real estate in incorporated towns and cities may be included in a subdistrict and taxed; (4) For a city resident to vote in the referendum provided by Section 278.200, RSMo 1959, he must qualify as a land representative which is defined in Section 278.070, Cum. Supp. 1963; and (5) Incorporated towns and cities are not included in watershed subdistricts organized prior to October 13, 1963.

February 17, 1964

OPINION NO. 15

Mr. Harold Owens, Executive Secretary
Missouri Soil and Water Districts Commission
T-9 Building, University of Missouri
Columbia, Missouri



Dear Mr. Owens:

This refers to your letter in which you requested advice from this office concerning certain legal questions in connection with the revision of your commission's instructions concerning the organization and operation of subdistricts of soil and water conservation districts in the light of amendments to the applicable statutes contained in Senate Bills No. 206 and 220, 72nd General Assembly, effective as of October 13, 1963.

Your first question relates to a requirement of Section 278.250, Cum. Supp. 1963, that as a condition to the levying of a subdistrict tax there be "obtained agreements to carry out recommended soil conservation measures and proper farm plans from owners of not less than sixty-five percent of the lands situated in the subdistrict." Your question is as follows:

"Are U. S. Forest Lands, state and county lands considered when calculating the percentage?"

Section 278.250, which was amended in certain respects by Senate Bill No. 220, expressly requires that agreements be obtained from the owners of not less than sixty-five percent of the lands situated in a subdistrict and it makes no distinction whatsoever between lands upon the basis of the nature of their ownership.

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This is similar to the situation considered in an opinion of this office under date of July 21, 1961, addressed to the Honorable Morran D. Harris, which is enclosed.

In that opinion this office held that: "Land owned by the State Conservation Commission does not count in the total acreage of an area for the purposes of determining whether landowners petitioning for the creation or dissolution of a special road district own at least 50 percent of the acreage as required by law."

The reasons given for such conclusion were based on the considerations of fairness by the state to the other property owners in the area. It would be unfair for a state agency not subject to taxation to control the disposition of the property taxes and the roads of the area's landowners.

The opinion further based its conclusion on the general rule of statutory construction stated at 59 C. J. Statutes, §653, p. 1103:

"The state and its agencies are not to be considered as within the purview of a statute, however general and comprehensive the language of such act may be, unless an intention to include them is clearly manifest, as where they are expressly named therein, as included by necessary implication. . . ."

It is the opinion of this office that such reasoning also applies to the situation at hand and we conclude that federal, state and county lands are not to be considered in calculating the percentage of agreements necessary "to carry out recommended soil conservation measures and proper farm plans from owners of not less than sixty-five percent of the lands situated in the subdistrict as required by Section 278.250.

In question no. 3 of your letter, you request our opinion concerning the interpretation to be given to paragraph 4 of Section 278.250, which provides:

"4. The governing body of each soil and water conservation district containing a subdistrict or a portion thereof shall make the necessary millage levy on the assessed valuation of all real estate within the

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boundaries of the subdistrict lying within their respective district to raise the needed amounts, but in no event shall the levy exceed four mills on each one dollar of assessed valuation per annum and, on or before the first day of September of each year, shall certify the rate of levy to the county court of the county within which the district is located with directions that at the time and in the manner required by law for the levy of taxes for county purposes the county court shall levy a tax at the rate so fixed and determined upon the assessed valuation of all the taxable property within the subdistrict, in addition to such other taxes as are levied by the county court."

Your question concerning such section may be restated as follows:

Is it the correct interpretation of Section 278.250(4) that the assessment of the subdistrict levy is to be on real estate only?

It is a general rule of law that tax laws must be strictly construed in favor of the taxpayer and against the state and if the right to tax is not plainly conferred by statute it is not to be extended by implication. *Osterloh's Estate v. Carpenter*, 337 SW2d 942; in *Re Gerling's Estate*, 303 SW2d 915.

Keeping this rule in mind, it follows of necessity that the only property that the governing body of the board can have the county court levy taxes on is real estate.

When the statute says the county court shall levy a tax on "all the taxable property in the subdistrict," it necessarily means, "all the real estate," as this is the only property on which the governing body of the soil and water conservation district may levy under Section 278.250. The phrase "all the taxable property" refers back to "all the real estate" which for all extents and purposes is all the taxable property which the governing body may levy upon.

In No. 2 of your letter you have raised three questions concerning Section 278.170 as amended by Senate Bill No. 206, 72nd General Assembly. The statute provides the method by which land representatives in a proposed subdistrict may petition the board for a hearing and a referendum thereon. The statute sets up certain requirements as to the number signing the petition and the area to be encompassed. The 1963

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revision of the statute removed from the requirements as to area that it be:

" . . . in the same watershed but in no event shall it include any area located within the boundaries of an incorporated city or town."

The only requirement as to area which remains is that it be contiguous.

The first question you raise with respect to this statute is as follows:

"Are lands and property (homes, lots and businesses) in incorporated towns included in the subdistrict and subject to the tax and can they vote in referendum?"

It is clear from the revision that the legislature intended to include real estate in incorporated areas in the proposed subdistrict, for without repeal of this exclusionary provision they could not have been so included and inclusion of incorporated areas and property in other watersheds is the only reasonable purpose for the repeal.

It is a general rule of construction that the legislature intended the necessary results of its acts. The necessary result of such repeal is to include otherwise excluded areas; thereby, making it possible for a soil and water conservation subdistrict to include an incorporated city or town.

The real estate located in such incorporated cities or towns included in a soil and water conservation subdistrict is subject to taxation under Section 278.250. The tax is to be levied on "all real estate within the subdistrict," thus, including real estate in incorporated towns and cities if such are included in the subdistrict.

The owners of the real estate in such included incorporated city or town cannot vote in the referendum unless they meet the qualification of land representatives, for Section 278.200, RSMo 1959, calls for a referendum by land representatives.

This brings us to point 2.B. of your letter which reads as follows:

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"What is the definition of a 'land representative' under these amendments?"

A land representative under these revisions is the same as before the revisions, i.e., what they are defined as in Section 278.070, Cum. Supp. 1963, which provides:

"(2) 'Land representative' means the owner or representative authorized by power of attorney of any farm lying within an area proposed to be established, and subsequently established, as a soil and water district under the provisions of this law, and for the purposes of this law each such farm shall be entitled to representation by a land representative; provided, however, that any land representative must be a taxpayer of the county within which the soil and water district is located;"

Therefore, he must be the owner or representative authorized by power of attorney of any farm and a taxpayer in the county within which the soil district is located. If any real estate within an incorporated city or town is a farm then the land representative of that tract of real estate is entitled to vote in the referendum. The owners or occupants of other real estate in the incorporated city or town, as well as the owners or occupants of real estate other than farms in other parts of the subdistrict, are not entitled to vote at the referendum although their property is subject to taxation by the subdistrict.

In No. 2.C. of your letter you ask:

"Will incorporated towns be included in previously organized watersheds' subdistricts? Is this inclusion retroactive?"

Section 278.170, RSMo, requires that the boundaries of the proposed subdistrict shall be set forth in the petition by legal description and prior to Senate Bill No. 220, the proposed subdistrict was to exclude "any area located within the boundaries of an incorporated city or town." Hence, the boundaries of existing subdistricts do not include such incorporated towns or cities. Therefore, incorporated towns and cities will not be automatically included in watershed subdistricts organized prior to October 13, 1963.

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CONCLUSION

Therefore, it is the opinion of this office that: (1) Federal, state and county lands are not to be considered in calculating the percentage of agreements necessary to carry out recommended soil conservation measures and proper farm plans from owners of not less than sixty-five percent of the lands situated in the subdistrict required by Section 278.250, Cum. Supp. 1963; (2) The subdistrict levy under Section 278.250, supra, is to be assessed only upon real estate; (3) Under Section 278.170, Cum. Supp. 1963, the real estate in incorporated towns and cities may be included in a subdistrict and taxed; (4) For a city resident to vote in the referendum provided by Section 278.200, RSMo 1959, he must qualify as a land representative which is defined in Section 278.070, Cum. Supp. 1963; and (5) Incorporated towns and cities are not included in watershed subdistricts organized prior to October 13, 1963.

The foregoing opinion which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

Enc.

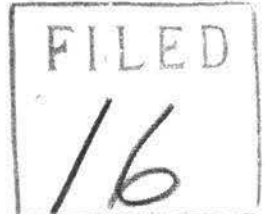
MOTOR VEHICLES:
HABITUAL CRIMINALS:
DRUNK DRIVERS:

Any person who is convicted of operating a motor vehicle in an intoxicated condition, Section 564.440, RSMo Cum.Supp. 1963, and who was previously convicted of violating Section 564.440, RSMo 1959, shall be punished as a subsequent offender under the applicable provision of Section 564.440 RSMo Cum.Supp. 1963.

January 6, 1964

OPINION NO. 362 (1963)
NO. 16 (1964)

Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri 65802



Dear Mr. Burrell:

You recently wrote to this office requesting an official opinion concerning our interpretation of the recently enacted drunken driving law.

On October 13 of this year, Senate Bill No. 78, enacted by the 72nd General Assembly, became effective. This act repealed Sections 564.440 and 564.460, RSMo 1959 and enacted in lieu thereof several new sections relating to the same subject matter of crimes in connection with the operation of motor vehicles. One of the newly enacted sections is also designated 564.440 (hereinafter referred to as the new section). The two sections repealed and the new section 564.440 appear as follows:

"564.440. Driving motor vehicle while intoxicated.--No person shall operate a motor vehicle while in an intoxicated condition, or when under the influence of drugs."

"564.460. Penalty for drunken driving or leaving scene of accident.--Any person who violates the provisions of section 564.440 or 564.450 shall be deemed guilty of a felony and on conviction thereof shall be punished by imprisonment in the penitentiary for a term not exceeding five years or by confinement in the county jail for a term not exceeding one year, or by a fine not exceeding one hundred dollars, or by both such fine and imprisonment."

New Section 564.440.

"No person shall operate a motor vehicle while in an intoxicated condition. Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor on conviction for the first two violations thereof, and a felony on conviction for the third and subsequent violations thereof, and, on conviction thereof, be punished as follows:

(a) For the first offense, by a fine of not less than one hundred dollars or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment.

(b) For the second offense, by confinement in the county jail for a term of not less than fifteen days and not exceeding one year.

(c) For the third and subsequent offenses, by confinement in the county jail for a term of not less than 90 days and not more than one year or by imprisonment in the department of corrections for a term of not less than two years and not exceeding five years.

(d) Evidence of prior convictions shall be heard and determined by the trial court, out of the hearing of the jury prior to the submission of the case to the jury, and the court shall enter its findings thereon.

(e) Any other provision in Section 302.309, RSMo, to the contrary notwithstanding, when a court having jurisdiction finds that a chauffeur or operator is required to operate a motor vehicle in connection with his business, occupation or employment, the court may grant such limited driving privilege as the circumstances of the case may justify if the court also finds undue hardship on said individual in earning a livelihood; provided, however, no such limited privilege shall be granted after conviction of a second offense of the crime mentioned herein." (Emphasis supplied)

Honorable Don E. Burrell

You specifically draw our attention to the underlined portion of the "new" section above and ask whether this language means that convictions under the repealed Section 564.440 are to be counted in determining the punishment for a conviction under Section 564.440, Senate Bill 78, 72nd General Assembly. We assume that you are referring to those who are convicted of offenses committed after October 13, 1963.

It is the opinion of this office that anyone who has been previously convicted of violating "old" Section 564.440 and who then is convicted of violating the "new" Section 564.440 because of an offense committed after October 13, 1963, shall be punished as a subsequent offender under the appropriate subsection of "new" Section 564.440.

In your letter you place particular emphasis upon the phrase "any person who violates the provisions of this section" which is found in the "new" Section 564.440. It is our view that the violations referred to are those resulting from the activity which the statute declares to be unlawful. *United States v. Dauphin*, 20 Fed. 625, 627 (1884). This is the same criminal activity, operating a motor vehicle while in an intoxicated condition, which was prohibited by "old" Section 564.440. The crime remains the same, only the punishment for offenses committed after October 13, 1963, has been changed. Section 1.120, RSMo 1959 fully supports our conclusions. It reads as follows:

"The provisions of any law or statute which is reenacted, amended or revised, so far as they are the same as those of a prior law, shall be construed as a continuation of such law and not as a new enactment."

The fact that "new" Section 564.440 provides for an increased minimum punishment upon conviction for subsequent offenses does not make the statute retroactive nor does it run afoul of any constitutional guaranty. *State v. King*, 365 Mo. 48, 275 SW2d 310 (1955). *State v. Morton*, Mo. Sup. 338 SW2d 858 (1960). As stated at 25 Am. Jur., *Habitual Criminals*, Section 3, page 261:

"While there are many rules of law which may seem inconsistent with the purpose of a habitual criminal statute and the procedure adopted to compass it, it is nevertheless sound in principle and sustained by reason. Aside from the offender

Honorable Don E. Burrell

and his victim, there is always another party concerned in every crime committed, namely, the state; and it does no violence to any constitutional guaranty for the state to enhance the punishment for second or subsequent offenses. The true ground upon which these statutes are sustained is that the punishment is awarded for the second offense only and that in determining the amount or nature of the penalty to be inflicted, the legislature may require the courts to take into consideration the persistence of the defendant in his criminal course."

In the King case, supra, the legislature enacted a law in 1951 which imposed a greater punishment upon those three times convicted of larceny. In that case the court sustained a punishment based upon the defendant's prior convictions of larceny which occurred before the enactment of the 1951 statute, and at 275 SW2d 312 said:

"One does not violate Laws 1951, p. 455, unless he commits a larceny subsequent to its effective date. The statute applies to 'Every person who shall have been convicted three times of larceny in any degree and who subsequently' commits another larceny. It is similar in this respect to §556.280, our habitual criminal act. All are charged with knowledge of the provisions of the statute. The allegations of the prior convictions are not charges of distinct crimes but are merely to disclose facts bringing the new offense within the statute and for determining the criminality of the new offense. In ruling that prior convictions aggravating a new offense need not occur subsequent to the effective date of the statute, the cases hold that prior convictions of crime constitute a reasonable basis for the classification of offenders with respect to the severity of the punishments to be imposed."

Honorable Don E. Burrell

CONCLUSION

When an individual is convicted of driving while intoxicated for an offense committed after October 13, 1963, such person, if he has been previously convicted of one or more offenses under Section 564.440, RSMo 1959, shall be punished under provisions of Section 564.440, RSMo Cum.Supp. 1963, and such previous convictions will be applicable in determining the punishment to be assessed under Section 564.440, RSMo Cum.Supp. 1963.

This opinion, which I hereby approve, was prepared by my Assistant, Eugene G. Bushmann.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

EGB:bjj

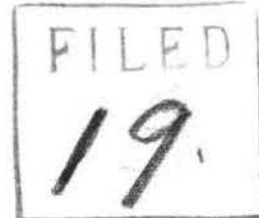
TAXATION:
MUNICIPAL HOUSING AUTHORITY:

Municipal housing authority subject to Chapter 99, RSMo 1959, not liable for ad valorem taxes assessed and levied, but not collected, on property it condemns, and such property may not be sold for such taxes.

January 23, 1964

Opinion No. 391 (63)
19 (1964)

Honorable Lon J. Levvis
Prosecuting Attorney
Audrain County
Mexico, Missouri



Dear Mr. Levvis:

This opinion is rendered in answer to your inquiry reading as follows:

"Some time prior to October 19, 1962, the Housing Authority of the City of Mexico, Missouri, instituted condemnation proceedings against a certain piece of residence property in the City of Mexico and owned by one Garlene Brooks, said real estate to be used in a housing project that then had been proposed. Commissioners were appointed and on October 19, 1962, they returned into Court an award of \$3,750.00. Said owner, in due time, excepted to said award. On June 12, 1963, after several juries had awarded damages in lesser amounts than the commissioners had awarded in the respective cases, Garlene Brooks filed in his case a withdrawal of his exceptions to the commissioners' award.

"Both at the time of the award to Brooks by the commissioners and at the time of his withdrawal of exceptions to that award the state and county taxes on said property for the years 1959, 1960, and 1961 were unpaid, and at the time of Brooks's withdrawal of exceptions the state and county taxes for 1962, also, were delinquent, and taxes for 1963 were a lien on said property. The State of Missouri, the County of Audrain, and the Audrain County Collector were not made parties to the condemnation proceedings. No notice of said condemnation proceedings was given to the State,

the County, or the Collector. The amount awarded by the commissioners (\$3,750.00) was paid into Court and disbursed by the Clerk without any provision being made for the payment of said taxes and without any notice to the State, County, or Collector. The Collector has demanded payment of said taxes by said Housing Authority. The Authority has refused to pay said taxes and takes the position that it is not liable for them.

"I wish that you would please let me have your opinion on the following question based on the foregoing facts: Has the acquirement of said property by said Housing Authority through the condemnation proceedings wiped out the state's and county's lien for said taxes so that said property cannot be sold by the collector and so that said Housing Authority has no responsibility for the payment of said taxes?

"The Housing Authority law is embodied in Chapter 99 of the Missouri Statutes. See, particularly, sections 99.080 and 99.200."

The legal character of a municipal housing authority formed under Chapter 99, RSMo 1959, is clearly described in the following language from Section 99.080, RSMo 1959:

"An authority shall constitute a municipal corporation, exercising public and essential governmental functions,
* * *".

In *Laret Investment Company v. Dickmann*, 345 Mo. 449, 1.c. 454, 455, 134 SW2d 65, we find the Supreme Court of Missouri alluding to the legal character of a municipal housing authority in the following language.

"The broad definition of a municipal corporation requires that it be formed for the purpose of performing some governmental function. The General Assembly, in the Act under consideration, declared the Housing Authority to be a municipal corporation, defined its purposes, declared them to be governmental functions, and declared the existence of an urgent necessity for its services.
* * * We must presume that the declared purposes are 'public purposes' and governmental functions unless it clearly appears that they are not in harmony with the provisions of the Constitution."

In *Schmoll v. Housing Authority of St. Louis County*, 321 SW2d 494, 1.c. 496, the following language sustains the proposition that a municipal housing authority is exempt from ad valorem taxes:

"It has been expressly held on two occasions, and all the reasons were fully considered, that housing authority property is exempt from ad valorem taxes. *Laret Investment Co. v. Dickmann*, supra; *Bader Realty & Inv. Co. v. St. Louis Housing Authority*, supra. [358 Mo. 747, 217 SW2d 489]"

The facts disclosed in your inquiry establish that prior to the time the municipal housing authority acquired title to the property in question by condemnation proceedings, taxes had been levied and assessed against the tract while under private ownership and that such taxes remained delinquent and unpaid by the private owner. To such state of facts we direct the following holding from *State ex rel. City of St. Louis v. Baumann*, 348 Mo. 164, 1.c. 168, 153 SW2d 31, 34:

"Even though taxes have been levied and assessed against a tract of land while under private ownership, if it be afterwards acquired by a governmental agency such taxes may not be collected."

The doctrine announced in *City of St. Louis v. Baumann*, supra, has been affirmed in the recent decision handed down by the Supreme Court of Missouri, en banc, on January 13, 1964 (not yet officially reported) in *State of Missouri ex rel. County Collector of Greene County, et. al., v. City of Springfield, Missouri, et. al.*, No. 49,424.

Enclosed find an opinion of this office dated September 5, 1947, addressed to Honorable Roy A. Jones, Prosecuting Attorney of Johnson County, Missouri, which directs attention to Section 139.120, RSMo 1959 (Sec. 11086 RSMo 1939), outlining the procedure for distraint of personal property of one liable for taxes on real estate.

CONCLUSION

It is the opinion of this office that a municipal housing authority subject to Chapter 99, RSMo 1959, is not liable for ad valorem taxes assessed and levied, but unpaid, on property it condemns for its purposes, and the property so condemned may not be sold for such taxes.

Mr. Lon J. Levvis

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The foregoing opinion, which I hereby approve was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

ENCL.

JLO/dg

THOMAS F. EAGLETON
Attorney General

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ADMINISTRATIVE LAW:
STATE BOARD OF EMBALMING:

The so-called "Pre-Need Arrangement For Memorial Services" is not a pre-need burial plan within the meaning of Section 333.035-1(12)(d), RSMo 1959, but is only a discount certificate. Licensed embalmers who directly or indirectly enter into Articles of Agreement for the sale of such plans are guilty of unprofessional conduct as defined in Section 333.035-1(12)(d). However, neither subparagraphs (c) nor (d) of this section prohibit embalmers from entering into contracts providing for the sale of genuine pre-need burial plans.

Opinion No. 403 (1963)
Opinion No. 21 (1964)

June 5, 1964

Mr. Charles L. Zaring, President
Missouri State Board of Embalming
Tenth and Walnut
Columbia, Missouri



Dear Mr. Zaring:

This is in answer to your request for an opinion of this office as to whether it would be conduct violative of Missouri law for an embalmer licensed under the laws of this state to enter into a contract to furnish burial services to persons purchasing a so-called "Pre-Need Arrangement for Memorial Services" sold by National Association Funeral Home Inc., herein called "Associated".

This contract or certificate is an agreement between the purchaser, called the plan owner, and the seller, called "Associated", which acts as agent of a funeral home named on the face of the agreement. It provides that the plan owner, by the payment of \$95.00, will receive at plan owner's death a credit of \$95.00 plus a 20% reduction from the retail price of the memorial service selected from the named funeral home. The services which the funeral home agrees to provide at a discount are listed in the contract. The purchase price may be paid in installments, but if the plan owner defaults in his payments, Associated may terminate the contract and retain all money previously paid.

To provide these certificates, Associated has entered into other contracts called Articles of Agreement with funeral homes throughout the state. Funeral homes entering into these agreements are referred to as "approved" funeral homes. The Articles provide that each "approved" funeral home agrees to make Associated its exclusive agent for the purpose of soliciting and acquiring new parties to the agreement and also for the purpose of securing funeral

contracts from the public. When the entire fee of \$95.00 is collected from the plan purchaser, Associated agrees to pay \$25.00 to the funeral home named on the contract and may retain the remaining \$70.00. Each "approved" funeral home agrees to honor all such contracts issued by Associated as agent for all other funeral homes which are or may become part of the agreement. However, neither the Articles of Agreement nor the certificate for burial services contain any provision for return of the money to a plan purchaser who moves into another state or into an area with no approved funeral homes.

Chapter 333, RSMo, relates to the regulation, practice, and licensing of embalmers. Many funeral homes are owned or operated by licensed embalmers. These embalmers may be held responsible by the Board for acts done in the name of the funeral home.

Section 333.035 authorizes the State Board of Embalming to suspend or revoke the license of any licensed embalmer for several causes which include:

"(12) Unprofessional conduct which is hereby defined to include:

* * * * *

"(d) The buying of business by the licensee, his agents, assistants or employees or the direct or indirect payment or offer of payment of a commission by the licensee, his agents, assistants and employees for the purpose of securing dead human bodies, but this provision does not prohibit the selling of pre-need burial contracts or insurance."

The burial certificate provides that Associated is acting as the agent of the approved funeral home named on the face thereof. Even without this statement, it is apparent that Associated is acting as the agent not only of the named funeral home but also as agent of all "approved" funeral homes. As the agent of the "approved" funeral homes and on their behalf, Associated, in accordance with its contractual obligation, calls upon members of the public to solicit the purchase of a burial certificate, and thus induce such purchasers at time of need to use the services of the funeral home named on the certificate or another funeral home affiliated with Associated. Each funeral home which has signed the Articles of Agreement has employed Associated for the purpose and paid it \$70.00 for each successful

solicitation. The fact that the fee is retained from the contract price rather than paid directly does not make it any less a commission. The payment is made indirectly by the funeral home as it must refund the entire \$95.00 at the time of need.

The payment of a commission or fee to Associated to induce persons to use the services of a particular funeral home and the embalmer or embalmers connected therewith constitutes the buying of business and the direct or indirect payment of fees for the purpose of securing dead human bodies within the meaning of Section 333.035-1(12)(d). A licensed embalmer who directly or indirectly enters into such an agreement is guilty of conduct in violation of the statute unless the agreement is a pre-need burial contract or insurance.

The agreement does not purport to be an insurance contract and specifically states that "This certificate is not a membership in a burial association, or an insurance company and is non-assessable." Nor has Associated attempted to qualify as an insurance company under the laws of this state. The question then remains: Is the self-styled "Pre-Need Agreement for Memorial Services" in fact a pre-need burial contract.

The term "Pre-Need burial contract" has not been defined in Missouri either by the legislature or by the courts. However, inherent in the meaning of the term is the idea that a pre-need burial contract is a contract for the payment of funeral or burial services or merchandise at a future time determined by the death of the person within the coverage of the contract. The pre-payment may be made in a lump sum or by installments but must be in payment for funeral or burial expenses that will be needed at a future date.

The contract in question contains none of these elements. There is no pre-payment of burial expenses as the plan purchaser does not pay any part of his future burial expenses. He receives only a discount on such expenses if he uses an approved funeral home.

The contract is called a Pre-Need Agreement for Memorial Services. The Articles of Agreement between Associated and the various funeral homes refer to the contract as a pre-need plan. Notwithstanding the attached labels, it is our opinion that the agreement in question is a discount certificate and is not a pre-need burial contract as that term is used in Section 333.035-1(12)(d). It is also our opinion that a licensed embalmer, acting by himself or through a funeral home who enters into such a contract is guilty of conduct which violates this section.

Your letter also requests our opinion as to the authority of the Board to revoke or suspend the license of an embalmer who participates in the sale of other burial plans being sold throughout the state.

Our office has obtained copies of most of these plans, which are all quite similar. They are not sold by funeral homes but through independent corporations. Each corporation is affiliated with one funeral home. Its name is quite similar to the funeral home and it is our understanding that in most cases the owners of the funeral home also own and operate the affiliated corporation.

Pre-need burial contracts are authorized by the law in Missouri. However, judging by the complaints received by the Board and by this office, this privilege may sometimes be abused and the public misled. Among these abuses are:

1. These plans are sometimes sold by a "hard-sell" house to house solicitation by salesmen employed by the selling corporation. Some people are repeatedly solicited for possibly unwanted services.

2. The selling corporation usually retains 25% of the contract price and the remaining 75% is to be placed in trust to be given to the funeral home which is to provide the service at the time of need. Some of these plans do not protect the plan owner against mismanagement or misuse of trust funds. Some plans do not require that the trust funds be placed in a reputable bank or trust company. Nor do they make provisions as to identity of the trustees or limit or prescribe the investment powers of the trustees.

3. The public is persuaded to purchase pre-need burial contracts upon a representation that they are receiving a large discount on their burial contract. The funeral homes usually receive 75% of the contract price, hence, it is difficult to see how funeral services can be provided at substantial discounts. The Board of Embalming has received complaints that shortly after a contract purchaser has received funeral services for the "discount" price, others have received the same services for approximately the same price.

4. Contracts are sometimes sold to persons who are not able to meet the payments. Sometimes they have moved away from the area and are not able to utilize the particular funeral home designated in the contract. If the plan owner defaults or after making all of his payments does not use the funeral home, the selling corporation retains 25% of the entire contract price.

Thus, if a contract purchaser agrees to buy a plan for \$1000 and defaults after paying \$260.00, the selling corporation may retain \$250.00 and is obligated to return \$10.00. Complaints from purchasers indicate they have difficulty obtaining return of payments in excess of 25%.

Some states have enacted laws regulating the sale of pre-need plans and the manner in which the proceeds must be handled. Perhaps this is a subject that might be considered by the Legislature.

Possibly most licensed embalmers will not feel it necessary to participate in such plans in order to compete successfully with those now doing so. There may be plans which are honestly conceived, sold, and administered; but, abuses and inequities which have characterized many such plans should be adequate warning to any licensed embalmer to approach such plans with caution lest the public, whom he is licensed to serve, be defrauded in time of greatest sorrow and susceptibility.


CONCLUSION

The so-called "Pre-Need Arrangement For Memorial Services" (which provides that the owner of a certificate costing \$95.00 will receive at his death a credit of \$95.00 plus a 20% reduction from the retail price of a funeral from a named funeral home), is not a pre-need burial plan within the meaning of Section 333.035-1(12)(d), RSMo 1959, but is a discount certificate. Licensed embalmers who directly or indirectly enter into the Articles of Agreement for the sale of such plans are guilty of unprofessional conduct as defined in Section 333.035-1(12)(d).

However, neither subparagraphs (c) or (d) of this section prohibits licensed embalmers from entering into contracts providing for the sale of genuine pre-need burial plans.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

Opinion No. 408 Answered by Letter
(Stephan)

Opinion No. 22 (1964)

May 26, 1964



Honorable Gerald Kiser
Prosecuting Attorney
Clay County
Liberty, Missouri

Dear Mr. Kiser:

This is in response to your request for an opinion of this office, which request reads in part as follows:

"This is to request your opinion concerning recording of certain instruments.

"Attached hereto you will find a copy of a document which has been presented to our Recorder of Deeds to be filed. He has received a number of these. You will note that the second paragraph of this document refers to a note above described.

"Our Recorder is concerned with whether or not the original of this note should be presented to him for comparison and identification at the time the document is recorded. It should be noted, that in addition to what appears on the document sent to you, a legal description of the property is usually taped to the document."

The sample agreement attached to your letter is set out below:

Honorable Gerald Kiser

"AGREEMENT

"In consideration of the extension of credit as evidenced by a note for \$622.97 of even date herewith, given by the undersigned payable to Your Bank of Kansas City, Mo. representing cost of improvements to the following described property in Clay County, state of Mo.

The undersigned agree that they will not sell or convey said property without first paying the balance of said loan in full, and that said property and their interest therein, shall stand as security for the enforcement of this Agreement.

"This agreement shall enure to the benefit of any subsequent owner and holder of the note above described.

"IN WITNESS WHEREOF, the undersigned have set their hands this 31st day of September 1963.

John Roe

Mary Roe

"STATE OF MISSOURI
COUNTY OF CLAY

"Be it remembered that on this day Sept. 31 A. D., 1963, before the undersigned, a notary public, in and for the said county and state aforesaid came John Roe and Mary Roe who are personally known to me to be the same persons who executed the within instrument of writing and such persons duly acknowledged that they executed the same as their free act and deed.

Honorable Gerald Kiser

"IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my seal the day and year last above written.

Harry Doe
Notary Public"

In the premises we believe that this situation is provided for by Section 443.050, 1963 Cum. Supp., which reads in part as follows:

"1. In all cities in this state which now have or may hereafter have six hundred thousand inhabitants or more, and in all counties of class one and two, when any mortgage or deed of trust or other instrument intended to create a lien upon real estate to secure the payment of a debt or obligation evidenced by an instrument or instruments in writing, shall be filed for record, the instrument or instruments representing the principal of such debt or obligation or any part thereof shall be presented to the recorder of deeds at the time of such filing for record, or in case the mortgage or deed of trust or other instrument is to be filed in more than one county, then to the recorder of the county where first filed, and the recorder shall, for the compensation of twenty-five cents for each of the first four of such instruments identified by him and ten cents for each additional instrument identified by him, stamp or write upon each such instrument evidencing principal so secured an identification thereof as being a note, bond or other evidence of debt described by such mortgage, deed of trust or other instrument of security."

Since Clay County is a county of the second class, the foregoing would seem to require recording "the instrument . . . representing the principal of such debt or obligation" if the "agreement" set out above may be characterized as "any mortgage or deed of trust or other instrument intended to create a lien upon real estate to secure the payment of a debt or obligation. . . ."

Honorable Gerald Kiser

Without deciding whether the sample agreement set out above does in fact create a lien upon the real estate in question, we are of the opinion that the agreement is clearly "intended to create" such an encumbrance.

Therefore, your question as to whether the original note should be presented to the recorder at the time that the agreement is presented for recording is answered in the affirmative.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:lt

OPINION NO. 449 (1963)
No. 27 (1964)

(Answered by Letter - Stevens)

June 24, 1964



Honorable Lawrence F. Gepford
Prosecuting Attorney
Jackson County
Independence, Missouri

Dear Mr. Gepford:

This is in reply to your opinion request of November 1, 1963, regarding the newly enacted, "driving while intoxicated" statute, namely 564.440, V.A.M.S., 1963, in which you ask the following:

"Is the uniform traffic ticket sufficient to serve as both a complaint and information? If not, is it the opinion of your office that the uniform traffic ticket is legally sufficient to serve as a complaint only, with a separate information being filed, or should both complaint and information be filed as in other misdemeanor cases?"

Section 564.440, V.A.M.S., 1963, states that a person operating a motor vehicle in an intoxicated condition shall be guilty of a misdemeanor upon conviction for the first two violations with different punishments for each of such convictions. For the third and all subsequent violations, he shall be guilty of a felony.

(We assume you are inquiring only regarding the use of the uniform traffic ticket when the violation constitutes a misdemeanor.)

Page Two
Honorable Lawrence F. Gepford
June 24, 1964

In promulgating Chapter 37 on Rules for Traffic Courts, it was no doubt the intention of the Supreme Court to have the "Uniform Traffic Ticket" serve not only as a summons, but also as a complaint and an information, see Supreme Court Rule 37.46, amended 1963. It is noted that the forms of the Uniform Traffic Ticket, as set out in Rule 37.1162 are entitled, "Suggested Forms". Further, Rule 37.466 specifically states that a "more detailed" information may be filed. This is an indication by the court that the Prosecuting Attorney may file an information at his option.

Rule 37.18 requires that "the information or complaint shall be plain, concise and definite."

The question presented is: Can the forms as filled out by the arresting officer at the scene be amended and be used as a complaint and information charging the crime of driving while intoxicated under Section 564.440.

The short answer is - yes, and where possible, it may be desirable.

We believe, however, that such use may not always be practical for the following reasons: (1) The officer making the arrest might not be informed as to previous convictions, thus necessitating an amended complaint or information, if needed; and (2) Because there is not sufficient space to add information making them complete, such as the endorsement of the State's witnesses as required under Supreme Court Rule 27.17; also, there is not sufficient space to properly describe the offense, nor is there sufficient space for the required jurat. We suggest, however, that tickets could be so prepared and printed following the suggested form, so that adequate space could be provided to fully comply with all rule requirements.

In the case of *City of Raytown v. Roach*, 360 S.W. 2d 741, the defendant was charged with a violation of a city ordinance. The complaint was filed on the form designated "Missouri Uniform Traffic Ticket", which is practically identical to the one discussed here. The court did not criticize the use of this form, but it did state that the information or complaint must contain a definite statement of the facts constituting the offense charged.

Page Three
Honorable Lawrence F. Gepford
June 24, 1964

The information or complaint must contain an allegation that the accused drove a motor vehicle on a public road while in an intoxicated condition at a certain time and place. The "Traffic Ticket" form should be amended so as to accomplish this. Supreme Court Rule 24.01 states that an information shall contain a plain, concise and definite written statement of the essential facts. It is possible to use the original ticket as a complaint when properly executed by the officer in a misdemeanor case, and also in traffic courts or municipal courts. However, it would be cumbersome to use these forms in a magistrate court and in felony cases because of the lack of space provided in the tickets as now printed.

It is our belief that the use of these forms may result in some confusion, and that the better practice would be for the prosecutor to redraft complaints and informations based on the facts taken from these tickets, or in the alternative, ticket forms should be so prepared and printed to provide adequate space for compliance with the rules of court.

We trust this is the information that you desire, and if we can be of further help to you, do not hesitate to call on us.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

OHS/fh

Criminal Law:
Misdemeanors:
Felony:
Driving While
Intoxicated:
Drunk Drivers:
Motor Vehicles:
Habitual
Criminals:
Informations:

(1) A person charged under DWI statute before its repeal may be tried thereunder after its repeal. However, the maximum punishment cannot exceed that imposable under the new DWI statute (Section 564.440, RSMo Cum. Supp. 1963), and the minimum punishment may be imposed under the repealed DWI statute (Section 564.460, RSMo 1959).
(2) Felony convictions for DWI obtained prior to October 13, 1963, may be pleaded and proved against a defendant to punish him as a subsequent offender under Section 564.440, RSMo Cum. Supp. 1963.
(3) The information or complaint should recite the necessary elements of DWI and the prior convictions should be pleaded in the same manner as priors under Section 556.280, RSMo 1959.

January 31, 1964

OPINION NO. 450-1963
NO. 28-1964

Honorable Charles H. Baker
Prosecuting Attorney
Dunklin County
Kennett, Missouri

FILED
28

Dear Mr. Baker:

This is in reply to your opinion request of November 9, 1963, in which you ask for certain legal interpretations under the new "driving while intoxicated" statute, known as Section 564.440, RSMo Cum. Supp. 1963.

I.

Your first inquiry is as follows:

"Is a pending felony charge for DWI under the prior law affected by the new law, and if so, to what extent?"

Under Sections 564.440 and 564.460, RSMo 1959, driving while intoxicated was a felony punishable by imprisonment in the penitentiary, by confinement in the county jail, or by a fine or both. These sections, however, were repealed by Section 564.440, RSMo Cum. Supp. 1963, whereby the first and second offenses of driving while intoxicated were deemed misdemeanors and punishable as such. However, a third and subsequent offense was deemed a felony and punishable as such.

Section 564.440, RSMo Cum. Supp. 1963, provides as follows:

"No person shall operate a motor vehicle while in an intoxicated condition. Any person who violates the provisions of this section shall be deemed guilty of a misdemeanor on conviction for the first two violations thereof, and a felony on

Honorable Charles H. Baker

conviction for the third and subsequent violations thereof, and, on conviction thereof, be punished as follows:

"(1) For the first offense, by a fine of not less than one hundred dollars or by imprisonment in the county jail for a term not exceeding six months, or by both such fine and imprisonment;

"(2) For the second offense, by confinement in the county jail for a term of not less than fifteen days and not exceeding one year;

"(3) For the third and subsequent offenses, by confinement in the county jail for a term of not less than ninety days and not more than one year or by imprisonment by the department of corrections for a term of not less than two years and not exceeding five years;

"(4) Evidence of prior convictions shall be heard and determined by the trial court, out of the hearing of the jury prior to the submission of the case to the jury, and the court shall enter its findings thereon;

"(5) Any other provision in section 302.309, RSMo, to the contrary notwithstanding, when a court having jurisdiction finds that a chauffeur or operator is required to operate a motor vehicle in connection with his business, occupation or employment, the court may grant such limited driving privilege as the circumstances of the case may justify if the court also finds undue hardship on said individual in earning a livelihood; provided, however, no such limited privilege shall be granted after conviction of a second offense of the crime mentioned herein."

Honorable Charles H. Baker

Section 1.160, RSMo 1959, provides as follows:

"No offense committed and no fine, penalty or forfeiture incurred, or prosecution commenced or pending previous to or at the time when any statutory provision is repealed or amended, shall be affected by the repeal or amendment, but the trial and punishment of all such offenses, and the recovery of the fines, penalties or forfeitures shall be had, in all respects, as if the provision had not been repealed or amended, except (1) that all such proceedings shall be conducted according to existing laws; and (2) that if the penalty or punishment for any offense is reduced or lessened by any alteration of the law creating the offense, the penalty or punishment shall be assessed according to the amendatory law."

In view of this section, if an individual, prior to the effective date of Section 564.440, RSMo Cum. Supp. 1963, was charged by information or indictment with the violation of the felony of driving while intoxicated under Section 564.440, RSMo 1959, but was not convicted therefor prior to the effective date of Section 564.440, RSMo Cum. Supp. 1963, he may presently be prosecuted for the violation of Section 564.440, RSMo 1959, but the maximum punishment upon conviction shall not be greater than that authorized by Section 564.440, RSMo Cum. Supp. 1963.

However, the minimum punishment provided by Section 564.440, RSMo Cum. Supp. 1963, is not applicable to such a conviction, and punishment authorized by Section 564.460, RSMo 1959, less than the minimum punishment authorized by Section 564.440, RSMo Cum. Supp. 1963, may be imposed. The increased minimum punishments authorized by Section 564.440, RSMo Cum. Supp. 1963, are not applicable in such a situation because application of such increased minimum punishments for a crime committed before October 13, 1963, would be unconstitutional because it would be in violation of Section 13, Article I, of the Constitution of Missouri, which

Honorable Charles H. Baker

provides that no ex post facto law can be enacted, and in violation of Section 10, Article I, of the United States Constitution, which provides that no state shall pass any ex post facto law.

In the case of *Lindsey v. Washington*, 301 U.S. 397, 57 Sup.Ct. 797, 81 L. Ed. 1182, the United States Supreme Court stated, at 1.c. U.S. 401:

"The Constitution forbids the application of any new punitive measure to a crime already consummated, to the detriment or material disadvantage of the wrongdoer."

II.

Your second inquiry states:

"Are the prior convictions referred to in the statutes in the state only under the new law, or would prior convictions of DWI in this state or any other jurisdiction be taken under consideration?"

A recent opinion of this office, issued on January 6, 1964, to Mr. Donald Burrell, Prosecuting Attorney, Greene County, Springfield, Missouri, fully covers this question.

This opinion advised that any person who is convicted of operating a motor vehicle in an intoxicated condition under Section 564.440, RSMo Cum. Supp. 1963 (for the commission of such offense after October 13, 1963), and who was previously convicted of violating Section 564.440, RSMo 1959, shall be punished as a subsequent offender under the applicable provision of Section 564.440, RSMo Cum. Supp. 1963.

A copy of said opinion is attached hereto.

III.

Your third inquiry states as follows:

"What is the appropriate wording of an information or complaint under each of the three subsections of 564.440?"

An information or complaint drawn under subsection 1 should merely recite the necessary elements of driving while

Honorable Charles H. Baker

intoxicated. However, an information or complaint drawn under subsections 2 and 3 should recite not only the elements setting forth the present charge of driving while intoxicated but, in addition thereto, should set forth the fact that the defendant has been previously convicted of driving while intoxicated. As stated in State v. McClay, 78 A. 2d 347, 350 [5]:

"When a statute imposes a higher penalty upon a second and third conviction, respectively, it makes the prior conviction of a similar offense a part of the description and character of the offense intended to be punished; and therefore the fact of such prior conviction must be charged as well as proved. * * *"

See also State v. Eickler, 248 Iowa 1267, 83 N.W. 2d 576; 42 Corpus Juris Secundum, Indictments and Informations, Section 145 B, page 1059.

In essence the prior conviction should be pleaded in the same manner as priors pleaded under our so called Habitual Criminal Act (Section 556.280, RSMo 1959). By way of procedure, however, these prior convictions alleged in the information must be proven in the same manner as other prior convictions and heard by the judge out of the hearing of the jury, and the judge must make his finding thereon prior to the submission of the case to the jury [Section 564.440(4), RSMo Cum. Supp. 1963]. This is necessary in order that the jury may be correctly directed as to the punishment to be imposed in the event the jury finds the defendant guilty. For, unlike our habitual criminal statute, the jury and not the judge determines defendant's punishment for the violation of this statute.

Conclusion

I. Although an individual charged with driving while intoxicated under Section 564.440, RSMo 1959, prior to its repeal date of October 13, 1963, may still be prosecuted under this repealed statute after October 13, 1963, the maximum punishment cannot be greater than that authorized by Section 564.440, RSMo Cum. Supp. 1963, but the minimum punishments provided in Section 564.440, RSMo Cum. Supp.

Honorable Charles H. Baker

1963, are not applicable and punishment less than the minimum authorized by Section 564.440, RSMo Cum. Supp. 1963, may be imposed as authorized by Section 564.460, RSMo 1959.

II. An individual's felony convictions for driving while intoxicated obtained prior to October 13, 1963, may be used to punish him as a subsequent offender under Section 564.440, RSMo Cum. Supp. 1963, for the commission of an offense after October 13, 1963.

III. An information or complaint should recite the necessary elements of driving while intoxicated.

A prior conviction should be pleaded in the same manner as priors under our so called Habitual Criminal Act (Section 556.280, RSMo 1959).

The foregoing opinion, which I hereby approve, was prepared by my assistant George W. Draper, II.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GD:BJ
Enclosure

ASSESSOR:
COUNTY ASSESSOR:
SECOND CLASS COUNTY:
MILEAGE:
TRAVEL EXPENSES:

An assessor of a second class county may receive from the county court reimbursement for reasonable travel expenses actually and necessarily incurred in carrying out his official duties within the county at the reasonable rate of eight cents per mile.

March 11, 1964

Opinion No. 29

Honorable Don E. Burrell
Prosecuting Attorney
Springfield, Missouri



Dear Mr. Burrell:

Your recent request for an opinion of this office reads as follows:

"I have been requested to obtain an opinion as to whether or not the County Court in a second class county can pay mileage to the County Assessor and if so, under what circumstances and at what rate can this mileage be paid."

This office was presented with a similar opinion request regarding the reimbursement for travel expenses of the collector of a second class county. This office concluded, in Opinion No. 283, under date of September 10, 1963, addressed to the Honorable Brunson Hollingsworth, that: "A collector of a second class county may receive from the county court reimbursement for reasonable travel expenses actually and necessarily incurred in the carrying out of the official duties imposed by Sections 139.080 and 150.110, RSMo 1959."

The situation involving the reimbursement of a collector of a second class county and the assessor of a second class county is very similar: Both lack a specific mandate for such reimbursement; both are to receive salaries in lieu of fees. The general statute, Section 49.275, RSMo 1959, providing for mileage to public officers of first class counties applies to collectors and assessors of first class counties but not to collectors and assessors of second class counties. In addition, in regard to the latter similarity, the assessor of the counties of the third and fourth class are now expressly provided travel expenses under Section 53.135, Cum. Supp., 1963.

It is the opinion of this office that due to the above stated similarities between collector and assessor of second class

Honorable Don E. Burrell

counties, the conclusion of this office that a collector of a second class county may receive reimbursement for reasonable travel expenses necessarily and actually incurred in carrying out the statutory duties of collector, applies equally to the assessor of a second class county so that he may receive reimbursement for reasonable travel expenses necessarily and actually incurred in carrying out the statutory duties of assessor.

Section 53.135, supra, which provides for reimbursement for assessors of counties of the third and fourth class "for actual and necessary travel expenses incurred in the performance of his official duties within the county at the rate of eight cents per mile," does not have the effect of prohibiting payment of such expenses in other counties where there is no statutory authority for such payment. Rather, it constitutes legislative recognition of the propriety of expenditures for travel expenses and the rate to be allowed.

In *Rinehart v. Howell County*, 153 SW2d 381, the court held that a statute, which provided stenographic expenses in larger counties did not exclude by such expression the payment of stenographic expenses in smaller counties but rather it constituted the basic recognition of the propriety of such expenses. Surely, if the legislature recognized the propriety of expenses in a smaller county, it of necessity must have recognized that such expenses exist in larger counties and did not intend to discriminate against the larger communities, just as in the *Rinehart* case it was held that the legislature did not intend to discriminate against smaller communities.

CONCLUSION

Therefore, it is the opinion of this office that an assessor of a second class county may receive from the county court reimbursement for reasonable travel expenses actually and necessarily incurred in carrying out his official duties within the county at the reasonable rate of eight cents per mile.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

COUNTY COLLECTOR:
FIRE PROTECTION DISTRICT:

The Collector of St. Louis County in collection of Fire Protection District taxes should deduct a commission of one per cent of such taxes.



February 7, 1964

Opinion No. 30

Honorable E. J. Cantrell
State Representative
3406 Airway
Overland 14, Missouri

Dear Mr. Cantrell:

This is in response to your request for an opinion of this office, which reads in part as follows:

"As you will recall, all Fire Protection Districts in St. Louis County have been incorporated pursuant to the Fire District Act as found in Sections 321.010 to 321.450 of the Revised Statutes of Missouri for 1959. Section 321.270 of that Act provides as follows:

"321.270 Duty to levy and collect taxes--delinquent taxes constitute a lien

"1. The body having authority to levy taxes within the county shall levy the taxes provided in sections 321.010 to 321.450, and all officials charged with the duty of collecting taxes in the county shall collect such taxes at the time and in the manner and with like interest and penalties as other taxes are collected. When collected such taxes shall be paid to the district ordering the levy and collection, or entitled to the same,

Honorable E. J. Cantrell

and the payment of such collections shall be made monthly to the treasurer of the district and paid into the depository thereof to the credit of the district. All funds received by the district shall be deposited in a depository and secured in the manner provided by law for the deposit of county funds.'

"(Emphasis added)

"Senate Bill No. 259 as enacted by the 72nd General Assembly and which has now been numbered as Section 52.260 of the Revised Statutes of Missouri, provides in part as follows:

"52.260 Commissions

"'The collector in counties not having township organization shall collect and retain the following commissions for collecting all state, County, bridge, road, school & all other LOCAL taxes, including merchants', manufacturers and liquor and beer licenses, other than back, delinquent and ditch and levee taxes, and the commissions constitute his compensation except in counties where the collector is paid a salary in lieu of fees:'

"Paragraph 15 of Section 52.260 provides as follows:

"'(15) In counties wherein the total amount levied for any one year exceeds four million dollars, a commission of 1% on the amounts collected.'

"I have advised the Fire Protection Districts in my district that there is a serious question in my mind regarding the liability of such Districts to permit the St. Louis

Honorable E. J. Cantrell

County Collector of Revenue the right to deduct the sum of 1% from the taxes so collected by him from Fire Protection Districts. I base my opinion on the fact that Section 321.270 of the Revised Statutes of Missouri requires the St. Louis County Collector to collect all of the taxes so levied by the Fire Protection Districts and to remit all of such taxes monthly to the Treasurer of the District.

"It is my position that if the Missouri Legislature had intended to authorize the Collector of Revenue to charge the Fire Districts for the collection of such taxes that such statement would have been made. Likewise, it is my opinion that Senate Bill No. 259 (Section 52.260 of the Statutes) does not, in exact terms, authorize the Collector to retain a Commission for the collection of Fire Protection District taxes. You will please note that in the Paragraph I have quoted above from Senate Bill No. 259 no reference is made to collection of taxes for Fire Protection Districts."

We enclose herewith a copy of an opinion issued under date of September 4, 1963, to the Honorable Alfred A. Speer, which opinion holds that the one per cent deduction authorized by Senate Bill 259 of the 72nd General Assembly in counties such as St. Louis County became effective on October 13, 1963.

Senate Bill 259 of the 72nd General Assembly is now codified as Section 52.260, RSMo Cum. Supp. 1963, and provides in part that "the collector . . . shall collect and retain (the amount specified thereafter) for collecting all state, county, bridge, road, school and all other local taxes," (parenthetical matter supplied and emphasis added)

We believe that the universal reference to "all other local taxes" encompasses taxes levied and collected under the authority of Section 321.230, RSMo 1959. You will note that that section authorizes the board "to order the levy and collection of ad valorem taxes on and against all taxable and tangible property within the district," Such a tax, therefore, must be regarded as a local tax.

Honorable E. J. Cantrell

Viewing this section in the light of Section 321.270, RSMo 1959, which provides in part that such taxes shall be collected "in the manner . . . as other taxes are collected . . .", impels the conclusion that the deduction authorized and directed by Section 52.260, RSMo Cum. Supp. 1963, must be withheld from taxes collected under the authority of Section 321.230, RSMo 1959.

CONCLUSION

It is the opinion of this office that the Collector of St. Louis County should deduct a commission of one per cent from all taxes collected under the provisions of Section 321.230.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Albert J. Stephan, Jr.

Very truly yours,

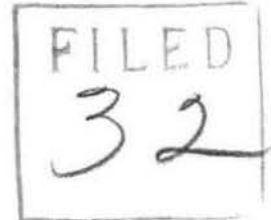
THOMAS F. EAGLETON
Attorney General

AJS:lt
Enclosure 1

Opinion Answered by Letter (Siddens)

OPINION NO. 32 (1964)
OPINION NO. 466 (1963)

February 19, 1964



Honorable Ronald M. Belt
State Representative
Macon County
115-1/2 Vine Street
Macon, Missouri

Dear Mr. Belt:

Your letter to us dated November 27, 1963, in essence, raises two questions. As to the first question, under the provisions of Section 77.040, RSMo 1959, as amended 1963 (H. B. 250, 72nd General Assembly), can Macon, a third class city organized under Chapter 77, RSMo, by ordinance provide for a city primary election for all elective offices?

Our opinion is that it can. Section 77.040, provides for elections in third class cities under Chapter 77, RSMo 1959. The amendment to Section 77.040 by the 1963 Legislature inserted only the following clause:

"* * * except that the city council may by ordinance provide for the nomination of officers by primary election under the provisions of sections 78.470 to 78.510, RSMo; * * *"

It is clear from this language that the Legislature intended to authorize third class cities under Chapter 77, RSMo, to provide for nomination of city officers by a primary election. The more obscure problem relates to the reference to Sections 78.470 to 78.510. This is so because those sections relate to third class cities with city manager form of government (Sections 78.430 to 78.640). Under city manager form for third class cities, the officers to be nominated and elected are considerably different than the officers to be elected under Chapter 77.

Honorable Ronald M. Belt

The rule is that statutes must be harmonized, if at all possible, to effectuate a valid and operative statute. I believe that the legislative intent was to use Sections 78.470 to 78.510 as to mode, methods, manner, form and time of such primary elections insofar as they can be applied to the nomination of officers to be elected in cities under Chapter 77.

As to your second question, that is, can a city of the third class conduct partisan political primaries and elections for the selection of city officers, please be advised as follows.

A reading of Missouri's statutes indicates the absence of any legislative authorization for such partisan primaries and elections. However, we take notice of the fact that for many, many years various cities throughout the State of Missouri have conducted partisan primaries and elections pursuant to ordinances enacted in said cities and sometimes pursuant to custom. In light of this long standing state of affairs, we are loathe to read into H. B. 250 a legislative intent to abolish these elective procedures long used in the aforesaid various municipalities.

Yours very truly,

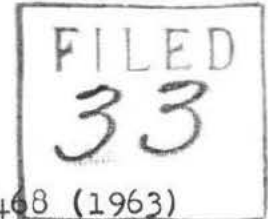
J. Gordon Siddens
Assistant Attorney General

JGS:10

NURSING HOMES:
NURSING HOME DISTRICTS:
BONDS:
ELECTIONS:

Nursing home district may not issue bonds up to ten per cent of value of taxable tangible property in such district. Nursing home districts may issue bonds to an amount of five per cent of the value of the taxable tangible property in such district.

January 30, 1964



OPINION NO. 468 (1963)
33 (1964)

Honorable Thomas G. Woolsey
Senator, 33rd District
Mason Building
Versailles, Missouri

Dear Senator Woolsey:

This is in answer to your letter of recent date requesting an official opinion of this office which reads as follows:

"Some of the people residing in a portion of my senatorial district are desirous of forming a Nursing Home District under the Nursing Home District Law. They have, in addition to making arrangements to follow the statutory procedures to set up their District, contacted a law firm in the western part of the state requesting an opinion as to the validity of any bonds that might be voted after such organization. The bond attorneys have raised the question as to whether or not the Nursing Home District Law is valid or not, in that this law authorizes Nursing Home Districts to issue bonds in an aggregate amount equal to 10% of the value of the taxable tangible property in the District,

Honorable Thomas G. Woolsey

despite the fact that the Constitution of the State of Missouri limits the issuance of bonds by political subdivisions of the State to 5% of the assessed valuation.

"Therefore, I would appreciate your furnishing me an opinion in regard to the following:

"1. May a Nursing Home District formed under the new law (Sections 198.210-350, inclusive), issue bonds in an aggregate amount equal to 10% of the value of the taxable tangible property within the District?

"2. If not, is the Nursing Home District Law invalid in its entirety?

"3. If not, could any District formed under the Nursing Home District Law, issue valid bonds, if the aggregate amount of such bonds did not exceed 5% of the assessed valuation of the property within the District?"

Section 198.310, RSMo Cum. Supp. 1963, authorizes the issuance of bonds by nursing home districts formed under the provisions of Sections 198.200 to 198.350, RSMo Cum. Supp. 1963, and such section provides in part as follows:

"3. The loans authorized by this section shall not be contracted for a period longer than twenty years, and the entire amount of the loan shall at no time exceed, including the existing indebtedness of the district, in the aggregate ten per cent of the value of taxable tangible property therein, as shown by the last completed assessment for state and county purposes, the rate of interest to be agreed upon by the parties, but in no case to exceed the highest legal rate allowed by contract; when affected, it shall be the duty of the directors to provide for the collection of an annual tax sufficient to pay the interest on the indebtedness as it falls due, and also to constitute a sinking fund for the payment of the principal thereof within the time the principal becomes due."

Honorable Thomas G. Woolsey

Sections 26(a) and 26(b) of Article VI of the Constitution of Missouri, provide as follows:

"(a) No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution.

"(b) Any county, city, incorporated town or village or other political corporation or subdivision of the state, by vote of two-thirds of the qualified electors thereof voting thereon, may become indebted in an amount not to exceed five per cent of the value of taxable tangible property therein as shown by the last completed assessment for state or county purposes, except that a school district by a vote of two-thirds of the qualified electors voting thereon may become indebted in an amount not to exceed ten per cent of the value of such taxable tangible property."

Under provisions of Section 26(b) of Article VI of the Constitution, political subdivisions are prohibited from becoming indebted in an amount greater than five per cent of the value of the taxable tangible property in such political subdivision. Section 198.200, RSMo Cum. Supp. 1963, provides that "when a nursing home district is organized, it shall be a body corporate and political subdivision of the state * * *." Since a nursing home district is a political subdivision of the state, the constitutional provision, Section 26(b) of Article VI, supra, prohibits such a district from becoming indebted in an amount greater than five per cent of the value of the taxable tangible property in such district.

Section 198.310 does not specifically authorize the incurring of an indebtedness to an amount of ten per cent

Honorable Thomas G Woolsey

of the taxable tangible property in a nursing home district but prohibits the incurring of such an indebtedness in excess of ten per cent of the value of a taxable tangible property in such district. This provision in section 198.310, which prohibits the incurring of an indebtedness in excess of ten per cent of the value of the property in a nursing home district is actually superfluous since the provisions of section 26 of Article VI of the Constitution of Missouri are self-enforcing and are read into the laws enacted by the Legislature authorizing the incurring of an indebtedness.

In the case of Thomas v. Buchanan County, 330 Mo. 627, 51 S.W. (2d) 95, the Supreme Court held that the provisions of Section 12 of Article X of the Constitution of Missouri, 1875, providing that political subdivisions shall not be allowed to become indebted to an amount in any year exceeding the income and revenue provided for such year without a vote of the people are self-enforcing and must be read into any statute relating to the incurring of an indebtedness by a political subdivision. The court in that case ruled on the validity of a "tax anticipation note" law and said, S.W. 1.c. 99:

"This contention is not well founded because section 12, article 10, of the Constitution, is self-enforcing and must be read into the act. * * *"

The provisions of Section 12, Article X of the Constitution of 1875 referred to by the court in such case are now found in Section 26 of Article VI of the Constitution, supra.

In the case of State ex rel. v. Gordon, 251 Mo. 303, 158 S.W. 683, the Supreme Court held mandatory and self-enforcing the provisions of Sections 12 and 12(a) of Article X of the Constitution of 1875 which prohibited any subdivision therein named from incurring an indebtedness in excess of the income and revenue for any such year without the assent of two-thirds of the voters, and which provided that such indebtedness should in no event exceed ten per cent of the value of the taxable tangible property in such subdivision. In that case the City of Dexter voted general obligation bonds in the amount of \$53,000. The assessment of the taxable tangible property in such city was \$485,466. The court held that the state auditor should not register such bonds because the indebtedness of such city would be in excess of ten per cent of the value of the taxable tangible property in such city if the bonds

Honorable Thomas G. Woolsey

were registered and the court held that the bonds were, therefore, void. The court said, 251 Mo. l.c. 311:

"The action of the board not being in compliance with the Constitution, and the proposed indebtedness being in excess of the prescribed limit, the bonds are void. * * *"

The Supreme Court of the United States has held that state legislation cannot authorize the incurring of indebtedness in excess of that authorized by state constitutional provisions.

In the case of *Buchanan v. Litchfield*, 102 U.S. 278, the Supreme Court of the United States said, l.c. 288:

" * * * No legislation could confer upon a municipal corporation authority to contract indebtedness which the Constitution expressly declared it should not be allowed to incur. * * *"

In the case of *Thornburg v. School Dist. No. 3*, 175 Mo. 12, 75 S.W. 81, the Supreme Court of Missouri held that the purchaser of bonds of a school district, which bonds had been issued in excess of the constitutional limit, could not recover from the school district on such bonds. The court held that the school board, by its issuance of bonds in excess of the constitutional limits even though authorized by the voters of the school district, had entered into a contract that it was forbidden by the constitution to make and that no recovery could be had by the purchaser of the bonds. The court pointed out that the voters may not have been willing to vote a lesser amount of bonds for a schoolhouse.

In the case of *Germania Savings Bank v. Darlington*, 27 S.E. 846, the Supreme Court of South Carolina decided a case in which the state constitution provided a maximum debt limit for cities of eight per cent of the value of property in such cities. A statute authorizing aid to railroads by the Town of Darlington provided "and for such purposes the said mayor and aldermen may issue bonds and scrip in any amount". The court held the statute authorizing the issuance of bonds in any amount valid but held that the constitutional limitation on issuance of bonds was read into such statute. The court said, l.c. 858:

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" * * * It is true that the act conferring the power to issue bonds does provide that the corporation may issue bonds in aid of railroads 'to any amount,' but, in order to avoid any conflict with the constitutional provision limiting the amount of the bonded debt of any town to 8 per centum of the assessed value of all the taxable property therein, that provision of the act must be qualified by such constitutional provision, and so read that the authority will be confined to the issue of bonds to any amount not exceeding the limit prescribed by the constitution, upon the well-settled principle that a statute will never be construed unconstitutional where it can be, in any possible way, reconciled with the provisions of the constitution. * * *"

We find not the slightest evidence of any legislative intent to make the creation of nursing home districts dependent upon the right of the voters of such district to authorize the issuance of bonds in excess of five per cent of the value of taxable tangible property in such district. So long as the voters themselves do not purport to authorize bonds in excess of the constitutional limit of five per cent of the value of the taxable tangible property in the district, there can be no question respecting the validity of such bonds.

Therefore, it is our view that nursing home districts are not authorized to incur an indebtedness by issuing bonds in an amount of ten per cent of the value of the taxable tangible property within a nursing home district. However, the district may issue bonds up to five per cent of the value of the taxable tangible property in such district when authorized by a two-thirds vote of the eligible voters in such district.

CONCLUSION

1. It is the opinion of this office that a nursing home district organized under provisions of Sections 198.210 to 198.350, RSMo Cum. Supp. 1963, may not issue bonds in an amount of ten per cent of the value of the taxable tangible property in such districts.

Honorable Thomas G. Woolsey

2. Nursing home districts may, when authorized by a two-thirds vote of the electors in the districts, validly issue bonds in an amount not in excess of five per cent of the value of the taxable tangible property in such districts.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CITIES, TOWNS & VILLAGES: County court cannot incorporate
INCORPORATION OF CITIES: unincorporated area upon petition as
CITY MANAGER ORGANIZATION: third class city with city manager
MUNICIPALITIES: form of government. Upon petition
COUNTY COURT: for incorporation as third class city
with city manager form of government
county court may incorporate as
regular third class city.

Opinion No. 469 (1963)
No. 34 (1964)

May 21, 1964

Honorable Brunson Hollingsworth
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Mr. Hollingsworth:

We have your letter in which you request an opinion of this office regarding the legality of a petition for incorporation submitted to the Jefferson County Court by the residents of a presently unincorporated area who propose to incorporate as the City of Arnold.

It appears from the copy of the petition which you submitted that the incorporators seek to form a third class city to be governed under the City Manager form of government pursuant to Sections 78.430 through 78.640, RSMo.

The specific questions which you ask are as follows:

"Query No. 1. Can the County Court lawfully incorporate the City of Arnold under the style of petition above described as a City Manager form of government under provisions of Sections 78.430 to 78.640.

"Query No. 2. In the event your answer to Query No. 1 is in the negative, may this County Court under the style of petition set out above lawfully incorporate the City of Arnold as a third class under Section 72.080, bearing in mind that the above petition seemingly requests the incorporation of the City of Arnold as a Council Manager form of government."

Honorable Brunson Hollingsworth

Section 72.080, RSMo 1959, to which you advert, provides for the incorporations of cities and towns, not previously incorporated, in accordance with their population and reads as follows:

"Any city or town of the state not incorporated may become a city of the class to which its population would entitle it under this chapter, and be incorporated under the law for the government of cities of that class, in the following manner: Whenever a majority of the inhabitants of any such city or town shall present a petition to the county court of the county in which such city or town is situated, setting forth the metes and bounds of their city or town and commons and praying that they may be incorporated, and a police established for their local government, and for the preservation and regulation of any commons appertaining to such city or town, and if the court shall be satisfied that a majority of the taxable inhabitants of such town have signed such petition, the court shall declare such city or town incorporated, designating, in such order the metes and bounds thereof, and thenceforth the inhabitants within such bounds shall be a body politic and incorporate, by the name and style of 'the city of, or 'the town of, and the first officers of such city or town shall be designated by the order of the court, who shall hold their offices until the first general election of officers, as provided by law and until their successors shall be duly elected and qualified."

Special provision is made by Section 72.090 for areas asking to incorporate as cities of the third class to be governed under the optional form of government provided in Sections 78.010 to 78.420, RSMo, the commission form of government. Said Section 72.090 reads as follows:

"Provided, that any city or town of the state of Missouri, not incorporated, having sufficient population to entitle it to become a city of the third class,

Honorable Brunson Hollingsworth

may include in its petition for such incorporation a request that it be authorized to avail itself of the provisions of sections 78.010 to 78.420, RSMo, and the county court, in passing upon such application, shall have power in its order of incorporation to authorize said city to be governed by the provisions of sections 78.010 to 78.420, RSMo, as fully as if the provisions of sections 78.010 to 78.420, RSMo, had been adopted by a formal election of the inhabitants of the territory comprised therein; and thereupon such county court shall appoint the officers of such city provided by sections 78.010 to 78.420, RSMo."

Sections 78.020, et seq., which provide for the organization of a city of the third class with a commission form of government, require that a special election be held for this purpose unless such organization is to be accomplished at the time of the original incorporation. Thus, the usual requirement of an election for the adoption of this optional form of government is expressly waived by statute in order that an area just incorporating may avail itself of the procedures set out in Section 72.090.

The only other optional form of government available to a third class city is the City Manager form of government, which, as previously stated, is provided in Sections 78.430 through 78.640. Section 78.430 sets out the procedures to be followed in adopting this particular optional form of government and reads as follows:

"Any city of the third class, or any city with a population entitling it to become a city of the third class, may become organized under the provisions of sections 78.430 to 78.640, by proceeding in the following manner: Upon petition of electors residing in the city equal in number to twenty-five per cent of the votes cast for all candidates for mayor in the last preceding election, the mayor shall by proclamation submit the question of organizing under sections 78.430 to 78.640, at a special election to be held at a time specified, within sixty

Honorable Brunson Hollingsworth

days after the petition is filed. Notice thereof shall be published in at least five issues of a daily newspaper of the city, or if there is no daily newspaper of the city, then in at least two issues of a weekly newspaper of the city. The first publication shall appear at least thirty days prior to the date of the election. At the election the proposition to be voted on shall be submitted in substantially the following form:

"SHALL THE CITY OF (NAME CITY)
ORGANIZE UNDER SECTIONS 78.430
TO 78.640, RSMo, PROVIDING FOR
THE CITY MANAGER FORM OF CITY
GOVERNMENT?

"YES.

"NO.

"(SCRATCH THE ONE YOU DO NOT
WANT.)

"The election thereon shall be conducted, votes canvassed, and results declared in the same manner as provided for by law in respect to other city elections of cities of the third class. If a majority of votes cast at the election is in favor of adopting the optional form of government provided for herein, the city clerk shall transmit to the secretary of state and to the county clerk of the county in which the city is located, duplicate copies of a certificate stating that the proposition was adopted. The city shall then proceed to organize under sections 78.430 to 78.640, by nomination of candidates and election of councilmen as herein provided. The elections shall be held at the first regular municipal election following the date of adoption of sections 78.430 to 78.640; except that, if a regular municipal election is not held within six months after date of adoption of this law, the mayor by proclamation shall call a special

Honorable Brunson Hollingsworth

election to be held within sixty days after the date of adoption, for the purpose of electing councilmen, and notice thereof shall be published in three issues of one or more of the daily newspapers of the city, or, if there is no daily, then in one issue of a weekly newspaper of the city, and the first issue shall appear not less than twenty days before the date of election. If the plan is not adopted, the question of adopting the plan shall not be resubmitted to the voters of the city for adoption for at least one year thereafter, and then the question of adoption may be resubmitted upon a like petition, proclamation and notice as provided above."

From a reading of this statute it is apparent that the law contemplates an existing city prior to organization under the City Manager form of government. Thus, the authorization is granted to "any city of the third class, or any city with a population entitling it to become a city of the third class" In order to determine the requisite number of signatures for the petition, it is necessary that there previously have been an election for mayor in the city. An existing mayor is required in order to proclaim the submission of the question to the electorate. Notice of the election must be given in newspapers "of the city". The statute envisions the prior election of a city clerk, who is to submit the results of the election to the secretary of state and to the county clerk. The statute also presupposes the holding of regular municipal elections prior to the submission of the reorganization question.

Similarly, Section 78.440 is framed in terms which assume the prior existence of a regularly incorporated city having municipal laws, boundaries, officers, etc.

From all of this it can be seen that the only statutory method provided for the adoption of the City Manager form of government contemplates the prior existence of an incorporated city or town. Unlike those statutes relating to the adoption of the other optional form of government for third class cities - the commission form of government - no provision is made for the waiver of a special election in the event the government is to be organized at the time of original incorporation.

Honorable Brunson Hollingsworth

For these reasons, we are forced to the conclusion that Sections 72.080 and 78.430 do not authorize the incorporation of a third class city under the City Manager form of government. While we can certainly understand the desire of the incorporators to avoid the difficulty and expense of holding two separate elections, we are bound by the action of the General Assembly or, as in this case, the failure of the General Assembly to provide for procedures for the adoption of the City Manager form of government similar to those provided for the adoption of the commission form of government.

Turning to your second question, we note that the petition for incorporation of the City of Arnold makes specific reference to Section 72.080 and prays for incorporation pursuant to that section. Further, the petition meets all of the requirements of that section, assuming that it has been signed by the requisite number of inhabitants. This being the case, it is our view that the county court may treat those portions of the petition praying for the organization of the city under the City Manager form of government as surplusage and may proceed to act upon the petition in the normal course.

CONCLUSION

1. An unincorporated area may not incorporate as a city of the third class having the City Manager form of government.

2. The county court may consider a petition for incorporation as a city of the third class presented pursuant to Section 72.080 in the normal course and may ignore such portions of the petition which pray for incorporation under the City Manager form of government.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

BRIDGES:
COMPENSATION:
COUNTY HIGHWAY ENGINEER:
HIGHWAY ENGINEER:
SPECIAL ROAD DISTRICT:

It is not part of the official duties of a county highway engineer to design and supervise the construction of bridges built by a special road district organized under the provisions of Sections 233.010 to 233.165, RSMo. The county highway engineer may be employed and compensated by such special road district to design and supervise the construction of a bridge to be built by such special road district.

OPINION NO. 35

February 7, 1964



Honorable Bernard Simcoe
State Representative
Callaway County
Fulton, Missouri

Dear Mr. Simcoe:

Your recent request for an official opinion of this office reads as follows:

"Is it a part of the official duty of a County Engineer to design and supervise the building of bridges in a special road district in the county? If it is not may he be employed by the Special Road District to do this and receive compensation for doing so?"

I have been informed that the special road district to which you have reference is a city or town road district organized under Sections 233.010 to 233.165, RSMo.

Section 233.115, RSMo, provides that the Board of Commissioners of such special road district may build bridges:

"Said board may, by contract or otherwise, under such regulations as the board shall prescribe, build, repair and maintain, or cause to be built, repaired, or maintained all bridges and culverts needed within said district; provided, however, that the county court of the county in which said special road district is located may, in its discretion, out of the funds available to it for that purpose, construct, maintain, or

repair, any bridge, or bridges, or culvert or culverts in such road district, or districts, or it may, in its discretion, appropriate out of the funds available for that purpose money to aid and assist the commissioners of said special road district, or districts, which shall be expended by the commissioners of said special road district, or districts, as above provided."

In addition to permitting the board of the special road district to build or contract to build bridges, the statute provides that the county court may also build bridges in the district or may appropriate funds to the board of commissioners to aid the district in its building of the bridges.

In the situation where the county builds the bridge, it would be the county highway engineer's duty to design and supervise the building of the bridge, and obviously as the special road district would not be building the bridge it could not hire him or compensate him for such work nor would it so desire.

But in the situation where the special road district is building the bridge, either totally with their own funds or with county funds appropriated to them for such purpose, the county highway engineer has no such duty to design and supervise the building of bridges in the special road district.

Sections 234.010 and 234.020, RSMo 1959, do not apply in the case of special road districts which are independent, corporate entities.

Section 234.010. "Each county court shall determine what bridges shall be built and maintained at the expense of the county and what by the road districts; provided, that no road district shall be compelled to build a bridge which costs fifty dollars or more."

Section 234.020. "The construction of all masonry or concrete culverts and bridges, and of all other bridges costing over fifty dollars, shall be under the supervision of the county highway engineer."

The road districts referred to in Section 234.010, supra, are the general road districts provided for in Section 231.010, RSMo 1959. Section 234.020, supra, necessarily refers to county bridges and general road district bridges

Honorable Bernard Simcoe

and not to special road districts. It is true the section provides that "all" bridges are to be under the supervision of the county highway engineer but this must be limited to the context in which it is found, to do otherwise would lead to the result that all state and federal bridge construction in the county would be under the county highway engineer's supervision, which is surely not the legislative intent, but rather the intent is that the county highway engineer is to supervise the construction of county and general road district bridges.

The legislature did not express any intention in the sections concerning special road districts that the county highway engineer had a duty to supervise the construction of special road district bridges and without such expression in the statutes the county highway engineer has no duty to so act.

Since the county highway engineer has no such duty to so act, he may be compensated for the performance of such acts if such acts are not so incompatible with his official duties so as to render such acts improper. The incompatibility does not mean physical inability to perform both jobs but some conflict in the duties required as where the county highway engineer, as such, has some supervision over himself in the performance of the job, is required to deal with, control or assist himself in such job. See *State ex rel. Langford v. Kansas City*, 261 SW 115, and an opinion of this office under date of September 8, 1961, addressed to Honorable Proctor N. Carter, which is attached.

This office finds no such incompatibility in the office of county highway engineer and employment by a special road district to design and supervise the construction of a bridge by such special road district.

CONCLUSION

Therefore, it is the opinion of this office that it is not part of the official duties of a county highway engineer to design and supervise the construction of bridges built by a special road district organized under the provisions of Sections 233.010 to 233.165, RSMo. The county highway engineer may be employed and compensated by such special road district

Honorable Bernard Simcoe

to design and supervise the construction of a bridge to be built by such special road district.

The foregoing opinion which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

Enc.
JDF:df

GASOLINE TAX:
SPECIAL ROAD DISTRICTS:
COUNTIES:

Counties are not authorized to give a specific percentage or a specific amount of motor fuel tax moneys to a special road district to be expended as such district sees fit.

OPINION NO. 478 (1963)
OPINION NO. 39 (1964)

February 6, 1964

Honorable Henry Balkenbush
Prosecuting Attorney
Osage County
Linn, Missouri



Dear Mr. Balkenbush:

This is in answer to your letter dated December 18, 1963, in which you request an official opinion from this office. In your letter you state the following:

"Can the County Court of Osage County, Missouri divide the proceeds of gasoline tax money apportioned to Osage County with a Special Road District in Osage County, Missouri when said funds are to be expended for road purposes in a Special Road District."

The answer to your question lies in a discussion of Article IV, Section 30(a), Constitution of Missouri, 1945. As you well know, this constitutional amendment became effective on March 6, 1962. The amendment provides for the imposition of a tax upon fuel used for propelling motor vehicles on our highways. Once the tax has been collected, the net proceeds of the tax, after deducting costs of collection, apportionment and making refunds, is apportioned between the counties, cities and the state. That portion designated for distribution to the counties is governed by the following language.

"Five per cent of the remaining net proceeds shall be deposited in a special trust fund known as the 'County Aid Road Trust Fund' which shall be credited to the various counties of the state on the following

Honorable Henry Balkenbush

basis: One-half on the ratio that the county road mileage of each county bears to the county road mileage of the entire state as determined by the last available report of the state highway commission and one-half on the ratio that the rural land valuation of each county bears to the rural land valuation of the entire state as determined by the last available report of the state tax commission, except that county road mileage in incorporated villages, towns or cities and the land valuation in incorporated villages, towns or cities shall be excluded in such determination, except that, if the assessed valuation of rural lands in any county is less than five million dollars, the county shall be treated as having an assessed valuation of five million dollars. The funds credited to each county shall be used by the county solely for the construction, reconstruction, maintenance and repairs of roads, bridges and highways, and subject to such other provisions and restrictions as provided by law. In the absence of other controls provided by law, the state highway commission shall prescribe policy, rules and requirement for the expenditure of these funds by counties, including, among other things, highway commission approval of plans for projects on which the funds are to be used. In counties having the township form of county organization, the funds credited to such counties shall be expended solely under the control and supervision of the County Court, and shall not be expended by the various townships located within such counties. 'Rural land' as used in this section shall mean all land located within any county, except land in incorporated villages, towns, or cities." Article IV, Section 30(a), Constitution of Missouri, 1945.

Honorable Henry Balkenbush

Your inquiry is whether a county can give a specific portion or a specific amount of motor fuel tax money received by such county to a special road district to be spent by such special road district as the board of such special road district sees fit.

It is clear from the provisions of Section 30(a), Article IV of the Constitution, supra, that special road districts are not allocated any portion of the tax moneys raised by the motor fuel tax.

Under such constitutional provision, the money so allocated to a county can be expended by such county solely for the construction, reconstruction, maintenance and repair of roads, bridges and highways and subject to other provisions and restrictions as provided by law. We do not find any authorization for counties to give a specific percentage or a specific amount of the money received by such counties from the motor fuel tax to a special road district to be expended by such special road district as the board of such special road district sees fit.

CONCLUSION

It is the opinion of this office that counties are not authorized to give a specific percentage or a specific amount of the moneys received by such counties from the motor fuel tax imposed by Section 30(a), Article IV of the Constitution, to a special road district to be expended by such special road district as the board of such special road district sees fit.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

EGB:bjj



February 19, 1964

Honorable Charles G. Hyler
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Hyler:

This letter is in answer to your recent request for an opinion as to whether the St. Francois County Court may obtain a private loan to match a government grant to build a new county jail without a vote of the residents of the county. Enclosed herewith are copies of two opinions rendered on August 7, 1953, to the Honorable Edgar Mayfield, Prosecuting Attorney of Laclede County and on November 13, 1936, to the Honorable A. P. Kidder, Presiding Judge of the Nodaway County Court.

For the reasons stated therein, it is our opinion that the court may not obtain a loan if it would create a debt against the county revenues in excess of the revenues on hand and the reasonably anticipated revenues for the year other than by a bond issue which must be approved by two-thirds of the qualified electors of the county. See Sections 108.010 - 108.350, RSMo 1959.

For your additional information, we have also enclosed opinions given on September 29, 1955, to the Honorable Robert L. Lamar, Prosecuting Attorney, Texas County and on October 31, 1960, to the Honorable J.W. Cooley, Prosecuting Attorney of Dade County.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

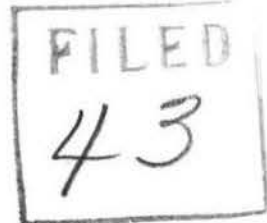
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SALES TAX:

Section 144.025, RSMO Cum. Supp 1963 applies to every retail sale involving a trade-in allowance, regardless of whether the person seeking to avail himself of the trade-in allowance had actually paid tax on the traded-in property.

OPINION NO. 43

April 3, 1964



Honorable Jack C. Jones
State Senator
16th District
Carrollton, Missouri

Dear Senator Jones:

This is in answer to your recent letter requesting an official opinion from this office. Your letter sets forth the following question:

"Mr. A. is General Manager of a rather small corporation. He traded an automobile which was titled in his name and on which sales tax had been paid to the State of Missouri, for a new automobile which he had titled in the name of the corporation. The difference between the trade-in allowance and the purchase price exceeded five hundred dollars. He has been told by the Department of Revenue that the sales tax will be computed on the total price of the new automobile. It is his position that the sales tax should be computed only on that portion of the purchase price in excess of the actual allowance made for the automobile which was traded in."

The sales tax provision (Section 144.025, RSMo Cum. Supp. 1963) authorizing the use of a trade-in allowance in determining the portion of the purchase price which is subject to our sales tax law reads as follows:

Honorable Jack C. Jones

"Other provisions of law notwithstanding, in any retail sale where any article on which a sales or use tax has been paid to this state is taken in trade as a credit or part payment on the purchase price of the article being sold and the difference between the trade-in allowance and the purchase price exceeds five hundred dollars, the tax imposed by sections 144.020 and 144.440 shall be computed only on that portion of the purchase price in excess of the actual allowance made for the article traded in or exchanged."

It is the opinion of this office that Section 144.025, supra, applies to the factual situation outlined in your letter. To quote the statute, sales tax "shall be computed only on that portion of the purchase price [of the new automobile] in excess of the actual allowance made for the article traded in or exchanged".

The legal conclusion we have reached involves our construction of Section 144.025, supra and can be better illustrated by a slight change in your factual situation. For example, suppose Mr. A had given his used automobile, upon which he had previously paid a Missouri sales or use tax, to the corporation. This transfer would not be taxable, and the corporation could obtain a certificate of title without the necessity of paying the Missouri motor vehicle use tax, Section 144.450, RSMo 1959. If the donee-corporation purchased a new automobile and used the older vehicle as a trade-in on this purchase, could it claim the special allowance of Section 144.025, supra, if the difference is over \$500.00? The answer to this question we believe is in the affirmative and lies in a determination that a purchaser may claim the trade-in allowance on an article of tangible personal property acquired by him through a nontaxable transaction.

Although the purchaser may not have paid a tax on the traded-in vehicle, it is our opinion that the legislative intent of Section 144.025, supra, was to classify articles of tangible personal property upon which a Missouri sales or use tax has been paid as distinguished from those articles upon which no tax has been paid. The former class of "articles" can be used in order to obtain a

Honorable Jack C. Jones

trade-in allowance while the latter class cannot. Such a classification seems reasonable to us. The General Assembly has wide discretion in making classifications for taxation purposes. State ex rel. Transport Mfg. and Equipment Co. v. Bates, Mo. Sup., 224 SW2d 996, 1000 (1949).

The language used in the statute refers to "any retail sale where any article on which a sales or use tax has been paid to this state is taken in trade. * * *" The word "any" is all comprehensive and the equivalent of the words "every" and "all". Hamilton Fire Insurance Co. v. Cervantes, Mo. App., 278 SW2d 20, 24 (1955); State ex inf. Rice ex rel. Allmon v. Hawk, 360 Mo. 490, 228 SW2d 785, 788 (1950). There is no mention in the statute of any requirement that the person wanting to avail himself of the allowance must have himself paid sales or use tax on the property being traded in. We believe none should be read into the statute because (using the language of the Supreme Court in Gas Service Co. v. Morris, Mo. Sup., 353 SW2d 645, 654 (1962)) "* * *there is no justification for inferring or concluding that the legislature meant to say anything other than the ordinary meaning of the words it used in section [144.025, supra] would indicate it did say". We must ascribe to the language in this section its plain and rational meaning.

CONCLUSION

Section 144.025, RSMo Cum. Supp. 1963 applies to every retail sale involving a trade-in allowance for an article on which a sales or use tax has been paid to the state, when the difference between the purchase price and the trade-in allowance exceeds \$500.00, even though such sales or use tax was paid by someone other than the person seeking to avail himself of the trade-in allowance.

The answer to your inquiry is that sales tax should be computed only on that portion of the purchase price of the new automobile which is in excess of the trade-in allowance given for the automobile previously titled in Mr. A's name.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

RECORDER OF DEEDS:
COUNTY RECORDER OF DEEDS:
DEATH CERTIFICATES:
RECORDS:

The recorder of deeds has authority
to accept for recording certified
copies of death certificates.

March 6, 1964

OPINION NO. 44 (1964)
OPINION NO. 483 (1963)



Honorable Earl R. Blackwell
State Senator, 22nd District
Hillsboro, Missouri

Dear Senator Blackwell:

You have requested an opinion which may be stated as follows: Is it the mandatory duty of recorders of deeds to accept death certificates for recording?

Section 59.330, RSMo Cum. Supp. 1963, provides in part:

"It shall be the duty of recorders to record:

"(1) All deeds, mortgages, conveyances, deeds of trust, bonds, covenants, defeasances, or other instruments of writing, of or concerning any lands and tenements, or goods and chattels, which shall be proved or acknowledged according to law, and authorized to be recorded in their offices; * * *."

This statute must not, however, be regarded as comprehensive because there are many other statutes which provide for instruments to be recorded. (See Cross References to Section 59.330, V.A.M.S.)

It must be regarded as the mandatory duty of recorders of deeds to accept for recording those instruments expressly referred to in Section 59.330 and other statutes. Our search fails to find a statute which expressly requires the recorder to record death certificates and no cases have been found which rule on the recordability of death certificates.

Honorable Earl R. Blackwell

The problem still remains, however, as to whether the language in Section 59.330, subparagraph (1) would include death certificates.

Consider then the use, function and purpose of death certificates. This subject is dealt with in Chapter 193, "The Uniform Vital Statistics Law". Its purpose is to assemble information in the Division of Health of the State Department of Public Health and Welfare, relating to births, deaths and marriages. Certificates of death must be filed with local registrars (Section 193.130), and local registrars are required to transmit all certificates to the state registrar (Section 193.310). Nothing, however, is found in this Chapter 193 requiring recording by the recorder of deeds.

Deaths and certificates relating thereto relate primarily to a status, condition or existing situation. But also, the title to real estate passes upon death in many instances, and always when the decedent is intestate. The modern trend of authorities relating to recording statutes tends to give a rather liberal construction to them. *Malicka v. Milan*, 320 Mich. 65, 30 NW2d 440, 442; *Davis v. Lewis*, Okla., 100 P.2d 994, 996; *Sadd v. Heim*, 143 Conn. 582, 124 A.2d 522, 524; *Burkett v. Peoples Bank of Biloxi*, 225 Miss. 291, 83 So.2d 185, 189; *Strong v. Clark*, 56 Wash.2d 230, 352 P.2d 183, 184, 185; *State ex rel. State Highway Commission v. Meeker*, 75 Wyo. 210, 294 P.2d 603, 605; *Merrill on Notice*, Sec. 923, 924, pp. 477-479; 45 Am. Jur., Sec. 34, p. 439, Sec. 49, p. 447; *American Law of Property*, Vol. IV, Sec. 17.8, pp. 550, 551, 553.

This likewise seems to be the trend in Missouri. *Schuster v. Schuster*, 340 Mo. 1110, 104 SW2d 353, 357; *Cook v. Tide Water Associated Oil Company*, Mo. App., 281 SW2d 415, 422, note 15.

Under the Missouri statute there is considerable opportunity to give a liberal construction of Section 59.330, and particularly the word "conveyances" and the words "or other instruments of writing, of or concerning any lands and tenements, or goods and chattels".

For example, it has long been accepted practice to record affidavits which recite facts relating to many things including deaths, marriages, children, heirs, and facts relating to family history which, of course, may be very important in the chain of title to real estate but which on their face do not expressly concern lands and tenements. See *Missouri Practice*

Honorable Earl R. Blackwell

by Volz, Vol. I, Sec. 152 to Sec. 160, pp. 69-76; see also Merrill on Notice, Sec. 938, pp. 495, 496. It can be strongly argued that such affidavits are instruments of writing concerning lands and may be used to clear a record title. Aker v. Lipscomb, 300 Mo. 303, 253 SW 995, 997, 998; Reeves v. Roberts, 294 Mo. 593, 242 SW 956, 957, 958. The only statutes we have found referring to the recordability of affidavits are: Section 59.313, applicable to City of St. Louis, which provides for fees to be charged by the recorder for recording affidavits; Section 490.370, relating to affidavit attached to a deed; Section 473.103, relating to recording affidavit respecting distribution of a small estate; and Section 443.060, regarding lost note affidavits.

Death certificates perform in some respects the same functions as affidavits with perhaps somewhat more dignity, and hence may be regarded either as conveyances or instruments of writing concerning lands. Especially this is so if the purpose of recording the death certificate is to show the devolution of title to real estate.

While the requirement for recording instruments accomplishes various purposes, Merrill on Notice, Sec. 919, p. 470, one of the principal purposes of the recording acts was to give constructive notice to subsequent purchasers or mortgagees of facts affecting title to real estate. If the courts of Missouri should eventually hold that death certificates are not recordable under Section 59.330, no harm would result because even though recorded they would, nevertheless, not amount to constructive notice. On the other hand, if the courts should eventually hold that they are recordable under said section, then recorders of deeds might very well be liable for their refusal to record them. We therefore conclude that death certificates should be accepted by recorders of deeds for recording when the person offering them for recordation satisfies the recorder that the purpose is to show a fact concerning the title or interest in lands, tenements, goods, or chattels.

A subsidiary question, however, should be considered. Is there any difference between the original death certificate and a certified copy thereof? While original death certificates must be filed with the local registrars and ultimately with the state registrar, as pointed out, Section 193.180, RSMo 1959, requires the state registrar to furnish a certified copy on request, and such certified copy must be considered for all purposes the same as the original. Hence,

Honorable Earl R. Blackwell

no distinction may be made merely because a certified copy is presented for recording rather than the original. Schuster v. Schuster, 340 Mo. 1110, 104 SW2d 353, 357. The fact that the death certificate is not acknowledged as a deed is acknowledged is not ground for refusal to record it.

CONCLUSION

The recorder of deeds has authority to accept for recording certified copies of death certificates.

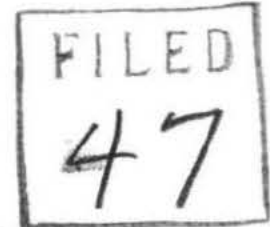
The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

FOR OPINION 487 (1963)
47 (1964)
(Answered by Letter--Chitwood)

June 8, 1964



Mr. Leon F. Burton
Secretary-Treasurer
State Board of Barber Examiners
131 Capitol Building
Jefferson City, Missouri

Dear Mr. Burton:

This office is in receipt of your request for a legal opinion as to whether or not the State Board of Barber Examiners, by their rule, can increase certain requirements to be met by an applicant for registration as a barber set out in Section 328.080, 2., (3), RSMo 1959, reading as follows:

"Our question is this: Could the State Barber Board make a ruling to increase the hours and months required without legislation?"

Section 328.080, Paragraph 2, RSMo 1959, to which the inquiry refers, reads as follows:

"2. The board shall proceed to examine the applicant and shall issue to him a certificate of registration authorizing him to practice the trade in this state and enter his name in the register herein provided for, if it finds that:

* * * * *

"(3) He has studied for at least one thousand hours in a period of not less than six months in a properly appointed and conducted barber school under the direct supervision of an instructor licensed as such by the board, and spent

June 8, 1964

an additional eighteen months as a registered apprentice under a qualified practicing barber or has practiced the trade in another state for at least two years; * * * * *

In an opinion of this office written for Mr. Charles F. Quinlin, Secretary, State Board of Barber Examiners, on December 6, 1954, (copy enclosed), it was concluded the State Board of Barber Examiners did not have the power to prescribe a rule limiting the period of time within which the eighteen-month training period, provided by what is now Section 328.080, RSMo 1959, must be spent.

In said opinion it was pointed out the Barber Board was an administrative body, with very limited rule-making powers.

Therefore, for the same reasons given in said opinion, and in answer to the present inquiry, it is our thought the State Board of Barber Examiners lacks the power and cannot make a rule increasing the requirements as to the hours of a barber school course and months of apprenticeship in excess of that set out in Section 328.080, Paragraph 2, (3), RSMo 1959. Any contemplated increase in such statutory requirements can be accomplished only by an act of the Legislature.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PNC/jlf

Opinion No. 50 Answered by Letter
(Northcutt)

March 5, 1964



Honorable Harold L. Henry
Prosecuting Attorney
Howell County
West Plains, Missouri

Dear Mr. Henry:

This letter, along with my letter of January 31, 1964, is in answer to your request of December 31, 1963, for an opinion concerning the mileage that may be charged and collected by the county assessor. This letter and my letter of January 31, 1964, are to be read together.

The statute in question, Section 53.135, Cum. Supp. 1963, in its pertinent part states as follows:

"* * * shall be allowed a reimbursement for actual and necessary travel expenses incurred in the performance of his official duties within the county at the rate of eight cents per mile * * *."

To specifically answer your question as to whether the assessor may charge and be paid for travel between his residence and his office, it is my opinion that he may not.

The actual and necessary expenses above referred to do not contemplate payment for such travel but only that "actual and necessary travel" brought about by the actual work and travel in arriving at a proper assessment of property within the county.

Honorable Harold L. Henry -2-

To put it in another manner, in order to obtain payment for travel expenses the assessor must have incurred them in the actual performance of such duties.

The obligation to be at the office is not an official duty of such officer nor is traveling to his office an official duty of his office. Or, in another way, it may be said that unless the Legislature has specifically included in the allowable expenses of public assessors the cost of traveling from their homes to the place where their work is regularly performed, such expenses cannot be held to be a legitimate public charge. Austin v. Barrett, 16 P.2d 12, 1.c. 16, and Thompson v. Fromiller, 107 P.2d 375.

Trusting that this will answer your question, I am,

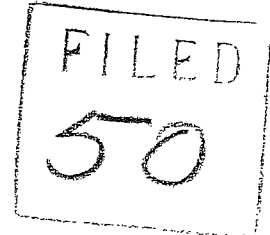
Very truly yours,

THOMAS F. EAGLETON
Attorney General

RRN:lt:bjj

Opinion No. 50 Answered by Letter
(Northcutt)

January 31, 1964



Honorable Harold L. Henry
Prosecuting Attorney
Howell County
West Plains, Missouri

Dear Mr. Henry:

I am writing you in answer to your request for an opinion concerning the traveling expenses of the assessor of Howell County, in which you specifically inquire whether or not the assessor may charge and be paid mileage by the county court in going to and from his residence to his office.

In answer to your request I am enclosing two prior opinions of this office as follows: an opinion dated September 10, 1963, to the Honorable Brunson Hollingsworth, Prosecuting Attorney of Jefferson County, concerning traveling expenses of county collectors and mileage of county collectors, and an opinion dated September 17, 1959, addressed to the Honorable Frederick E. Steck, Prosecuting Attorney of Scott County, concerning prosecuting attorneys' mileage. I believe that a reading of these opinions and a reading of Section 53.135, RSMo Cum. Supp. 1963, will answer the question you have put forth.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

Enclosures-2
RRN:lt

See Supplement Dated Feb-10-1964

SCHOOLS: In school districts organized under Sections 165.377-165.553 having a population of 75,000 - 200,000 where
SCHOOL DISTRICTS: a city political committee does not exist, nominations of candidates for school directors must be made under
ELECTIONS: Section 165.470 (3), RSMo 1959, i.e., by petition in the manner provided by Sections 120.180 - 120.230 RSMo
The school board of school districts organized under Sections 165.377 - 165.553 having a population of 75,000 - 200,000 have no authority to set forth by rule a method for nominating school board members. In school districts organized under Section 165.377 - 165.553, the school director election must be held in April 1964, even though no city political committee exists.

February 5, 1964

Opinion No. 55

Mr. Hubert Wheeler
Commissioner of Education
Jefferson City, Missouri

Dear Mr. Wheeler:

This opinion is rendered in response to your request of January 2, 1964, for an official opinion of this office. Your inquiry relates to "the method of selection of nominees for membership to the board of education in a school district in a city of 75,000 population where the city charter has eliminated the city political party committees within the city." You have posed the following questions regarding this matter:

- "1. Is it mandatory that a district follow provisions as outlined in Section 165.470 in the nomination of board members to be elected even though the party committees have been eliminated?
- "2. If there is no central committee in the city, would the local board of education have the authority to establish rules and regulations setting forth a method to be used in the nomination of board members within a district which has a city of more than 75,000?
- "3. Is it necessary that a district hold an election for board members in April, 1964, in the city where the central committee has ceased to exist?
- "4. If the board has the authority to establish procedures for the nomination of board members, could they establish the same provisions as is outlined in Senate Bill 3 as passed by the 72nd General Assembly?



Section 165.470, RSMo 1959, which provides for nomination of school directors in certain districts states, in part:

- "1. In any school district in this state now or hereafter organized or governed as provided by sections 165.377 - 165.553, * * * having a population of more than seventy-five thousand and less than two hundred thousand inhabitants, candidates for school directors may be nominated by a majority of the members-elect residing in such school districts of each political party committee of the city in which said school district is located.
* * * * *
- "3. Directors for such school districts may also be nominated by petition in the manner provided by general law."

So far as we have been able to determine, Section 165.470 is the only statutory provision for nomination of school directors applicable to districts organized under Sections 165.377 to 165.553 having a population of 75,000 - 200,000. We note that Section 165.470, RSMo 1959, has been amended by Senate Bill No. 3 of the 72nd General Assembly and will become Section 162.491 in the new codification of School laws to take effect July 1, 1965. See: Section 162.491, RSMo. 1963 Supp., Appendix p. 182. However, Section 165.470, RSMo 1959, states the presently applicable law.

I

Section 165.470, RSMo 1959, sets out the procedure for nominations of members of School boards of districts organized under Sections 165.377 - 165.553 having a population of 75,000 to 200,000 inhabitants. Where the city concerned does not have a city political committee, the only method for nominating school board candidates is by petition under subsection three, to wit:

- "3. Directors for such school districts may also be nominated by petition in the manner provided by general law."

The words "in the manner provided by general law" supra, refer to the Sections 120.180 - 120.230, RSMo, which prescribe the contents, form, and number of names required on nominating petitions. We are aware of the provision in Section 120.150 RSMo 1959, that "Sections 120.140 - 120.230 shall not apply to candidates for * * * school district offices." Section 120.150 excepts Sections 120.140 - 120.230 from applying to school districts generally. Section 120.150 is a general law. Section 165.470 (3) however, is a law of particular application and is to be given effect over any general law inconsistent with it.

"Under the established rules of statutory construction where there are two laws relating to the same subject they must be read together and the provisions of the one having a special application to a particular subject will be deemed to be a qualification of, or an exception to, the other act general in its terms." Veal v. City of St. Louis, Mo., 289 SW2d 7, 12.

As to your first question, it is the ruling of this office that the nomination process set forth in Section 165.470, RSMo 1959, must be followed in districts coming within its terms and that where the city political committee does not exist the remaining method (nomination by petition) must be used for nominations.

II

We turn now to your second question, whether the school board of a district organized under Sections 165.377 - 165.553 having a population of 75,000 to 200,000 has authority to make rules and regulations setting forth a method of nomination.

School district boards have only such powers as are expressly granted by the legislature or as can be necessarily implied from their granted powers.

" * * * A board of directors is but a creature of statute, and its members can exercise no authority unless the same is either expressly conferred or else arises by necessary implication from the powers that are conferred." Cape Girardeau School District No. 63 v. Frye, Mo., 225 SW2d 484, 488.

It is self-evident that a school board could not promulgate regulations which are inconsistent with legislative enactments. The expression of the legislature prevails over any school

district regulation.

"The Legislature has declared the public policy of this state, * * *. Respondent is merely the instrumentality of the Legislature, created for the purpose of carrying out that policy. It has no power to adopt a rule, or follow a practice, which results in nullifying the expressed will of the Legislature."
State ex rel. Springfield Warehouse and Transfer Co. v. Public Service Commission,
Mo. App., 225 SW2d 792, 794.

Accord: 73 CJS, Public Administrative Bodies, §94.

The Legislature has set out a method of nominations for school districts organized under Sections 165.377 - 165.553 having a population of 75,000 - 200,000 in Section 165.470 RSMo. 1959. We therefore, rule that school boards of such districts have no authority to set forth another method for nominating board members. This ruling also answers your fourth question.

III

Your third question is, "Is it necessary that a district hold an election for board members in April, 1964, in the city where the central committee has ceased to exist?"

Section 165.383 RSMo 1959 applicable to school districts organized under Sections 165.377 - 165.553 having a population of 75,000 to 200,000 provides:

"The qualified voters of the school district shall on the first Tuesday after the first Monday in April, in the year 1910, * * * (and) every two years thereafter * * * shall elect two directors * * *." (Parentheses added).

That is, an election of two directors in April 1964 is required by statute. We can conceive of no reason excusing compliance with the statutory mandate.

CONCLUSION

Therefore, it is the opinion of this office that:

1. In school districts organized under Sections 165.377 - 165.553 having a population of 75,000 - 200,000 where a city political committee does not exist, nominations of candidates for school directors must be made under Section 165.470 (3), RSMo 1959, i.e., by petition in the manner provided by Sections 120.180 - 120.230 RSMo.

2. The school board of school districts organized under Sections 165.377 - 165.553 having a population of 75,000 - 200,000 have no authority to set forth by rule a method for nominating school board members.

3. In school districts organized under Sections 165.377 - 165.553 having a population of 75,000 - 200,000, the school director election required by Section 165.383, RSMo. 1959, must be held in April 1964, even though no city political committee exists.

The foregoing opinion which I hereby approve was prepared by my assistant, Louis C. DeFec, Jr.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

LCD/dg

Supplement

February 10, 1964

Mr. Hubert Wheeler
Commissioner of Education
Jefferson City, Missouri

RE: Opinion No. 55

Dear Mr. Wheeler:

This letter is in response to your telephone inquiry of February 7, 1964. In a recent opinion of this office (Op. 55 to Hubert Wheeler issued February 5, 1964) we ruled:

"1. In school districts organized under Sections 165.377 - 165.553 having a population of 75,000 - 200,000 where a city political committee does not exist, nominations of candidates for school directors must be made under Section 165.470 (3), RSMo 1959, i.e., by petition in the manner provided by Sections 120.180 - 120.230 RSMo."

Section 120.220, RSMo 1959, states that petitions for nomination under Sections 120.140 - 120.230 shall be filed with the proper officer at least sixty-eight days previous to the day of election. You request amplification of our ruling quoted above as effected by Section 120.220, i.e., does the sixty-eight day provision of Section 120.220 apply to petitions for nomination of school directors under Section 165.470, RSMo. 1959?

Section 165.470 (3) cited in our ruling provides:

"Directors for such school districts may also be nominated by petition in the manner provided by general law."

Supplement

The answer to your present inquiry is found in the meaning and effect of the phrase, "in the manner".

The particular question here is whether the phrase "in the manner" includes the time provisions of Section 120.220. In the case of *Moore v. City Council of City of Los Angeles, Calif.*, 209 S.W. 64, 66 it was said:

"Whether the word 'manner' shall be construed as including, not only the way or mode of doing a thing, but also the time of doing it, depends upon the intention of the lawmakers, to be gathered from the context; that is, the 'manner' of doing a thing and the 'time' of doing it are distinct things, and ordinarily the word 'manner' will not be construed as including the element of 'time' unless it shall appear from the context that the lawmakers intended that it should."

Under the *Moore* rule, *supra*, unless the intent that the time provisions of Section 120.220 shall apply to Section 165.470 is manifest in the provisions of Section 165.470, the phrase, "in the manner" is not to be construed as including the element of time. No provision of Section 165.470 indicates expressly or impliedly that the Legislature intend the time element of Section 120.220 to apply to nominations of school directors under Section 165.470. Further we are of the opinion that a comparison of the subject matter upon which Section 120.220 and Section 165.470 operate manifest an intent that the sixty-eight day requirement of Section 120.220 shall not apply to nominations of school directors under Section 165.470.

Section 165.470 does not set out procedures for nomination by petition rather, it adopts by reference in subsection (3) "the manner provided by general law." The procedures of general law for nomination by petition are set out in detail by Sections 120.180 - 120.230. If the Legislature intended to adopt the procedures set out in Sections 120.180 - 120.230 literally and entirely, they could have easily done so by definite words to that effect. It is significant therefore that the Legislature did not use such words but instead used the phrase "in the manner". It is our opinion that subsection (3) of Section 165.470 does not adopt every literal detail of Sections 120.180 - 120.230 but only the mode of procedure defined by these sections so far as such is applicable to the subject matter of Section 165.470. The phrase, "in the same manner", has been held to mean "by the same proceedings so far as applicable to the subject matter". *State v. Cook, Tex.*, 14 S.W. 996, 998.

State and county wide elections involve numerous candidates and the procedural complications are many. Nominations must be determined in sufficient time to prepare the ballot.

Section 120.220 principally applies to general elections of state and county officers. In such elections party candidates are nominated by primary election about three months before the general election. Primary candidates are required to file about three months before the primary (§120.340). In this context, Section 120.220, requires nominating petitions to be filed sixty-eight days before election. Section 165.470, however, operates only in elections within a school district. The offices to be filled are few and the candidates not numerous. The ballots are easily prepared. Under subsection (2) of §165.470, nominations by political parties need not be filed until ten days before the election. In this context it is not reasonable to assume that the Legislature intended to require nominations by petition to be filed sixty-eight days before election. The sixty-eight day requirement of §120.220 is not reasonably applicable to the subject matter of §165.470, i.e., the nomination of school board directors.

The sixty-eight day requirement of Section 120.220 fits into the pattern for general elections where all nominations are made well in advance of the election, however, it does not fit into the pattern for school director elections where party nominations may be made up to ten days before the election. Therefore, it is our opinion that the provision of Section 120.220, requiring nominating petition to be filed sixty-eight days before the day of election does not apply to petitions for nomination of school directors under Section 165.470.

Since the sixty-eight day requirement of Section 120.220 does not apply, there is no time set by statute for the filing of nominating petitions under Section 165.470 (3). Therefore, such petitions may be filed at time prior to the election which allows reasonable time for the preparation of the ballots. Since subsection (2) of Section 165.470 allows nominations by political parties to be filed up to ten days of the election, it is our opinion that nominating petitions filed ten days prior to election would be filed within a reasonable time before the election.

We note in closing that Section 165.470, RSMo 1959, as amended by Senate Bill No. 3 of the 72nd General Assembly does not adopt "the manner provided by general law." Thus, the foregoing discussion will have no application after the effective date of Senate Bill No. 3, July 1, 1965. The law, renumbered as Section

Mr. Hubert Wheeler

-4-

162.491, will then provide:

"3. Directors for urban school districts may also be nominated by petition to be filed with the secretary of the board and signed by a number of voters in the district equal to ten per cent of the total number of votes cast for the director receiving the highest number of votes cast at the next preceding biennial election."

Yours very truly,

THOMAS F. EAGLETON
Attorney General

LCD/dg

RECORDER OF DEEDS: Recorder of deeds of trust of third-class county
THIRD CLASS COUNTIES: keeping marginal release of deeds of trust record
DUTIES: receiving additional compensation of one thousand
COMPENSATION: dollars per year therefor, under Section 59.255,
RSMo 1959, and who adopts microfilming for recording all
instruments, as provided by Section 109.120(3), RSMo Cum.
Supp. 1963, is not relieved of duty to keep marginal release
of deeds of trust record. He shall continue keeping said
record and receiving compensation therefor, as long as all
previously nonmicrofilm-recorded deeds of trust capable of
release by marginal entry remain unsatisfied of record. When
all such deeds of trust have been satisfied of record,
recorder shall cease to keep marginal release of deeds of
trust and shall not be paid any further compensation for
keeping said record.

OPINION NO. 57

April 24, 1964

Honorable Charles P. Moll
Prosecuting Attorney
Franklin County
Union, Missouri



Dear Mr. Moll:

This office is in receipt of your request for a legal opinion
which reads as follows:

"The Recorder of Deeds has requested that I
write for an Opinion regarding Section 59.255
R.S. Mo. 1959 in conjunction with Section
109.120 (3) passed in the last Session of the
Legislature.

"In particular, Section 59.255 imposes the
duty on Recorders in the 3rd class to main-
tain a separate 'marginal release of deeds
of trust index' for which he receives addi-
tional compensation in the sum of One Thou-
sand (\$1,000.00) Dollars. The new Section
109.120 (3) provides that in all cases where
instruments are microfilmed, no release shall
be made by marginal entry, but shall be made
by separate instrument.

"The question therefore resolves itself in
this manner:

"If the Recorder changes his system of record-
ing to micro-film in a 3rd class county, will

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he thereby lose the additional compensation provided in Section 59.255?"

Section 109.120 (3), RSMo Cum. Supp. 1963, permits a recorder of deeds to record instruments required or authorized to be recorded in his office, by photostatic, photographic, microphotographic, microfilm or similar mechanical process, and reads as follows:

"3. When any recorder of deeds in this state is required or authorized by law to record, copy, file, recopy, replace or index any document, plat, map or written instrument, he may do so by photostatic, photographic, microphotographic, microfilm, or similar mechanical process which produces a clear, accurate and permanent copy of the original. The reproductions so made may be used as permanent records of the original. When microfilm or a similar reproduction is used as a permanent record by recorder of deeds, duplicate reproductions of all recorded documents, indexes and files required by law to be kept by him shall be made and one copy of each document shall be stored in a fireproof vault and the other copy shall be readily available in his office together with suitable equipment for viewing the filmed record by projection to a size not smaller than the original and for reproducing copies of the recorded or filmed documents for any person entitled thereto. In all cases where instruments are recorded under the provisions of this section by microfilm, any release, assignment or other instrument affecting a previously recorded instrument by microfilm may not be made by marginal entry but shall be filed and recorded as a separate instrument and shall be in a separate book, cross-indexed to the document which it affects."

(Emphasis ours.)

Franklin County is one of the third class in which the offices of circuit clerk and recorder of deeds are separate, and the above-quoted section is applicable to said county. It is the duty of the

Honorable Charles P. Moll

recorder of such county to keep the marginal release of deeds of trust record and make the entries therein provided by Section 59.255, supra, whenever the circumstances may so require. For performance of such duties he shall be paid additional compensation, i.e., compensation in addition to all other compensation authorized by law in the sum of one thousand dollars per year out of the county treasury.

Section 109.120 (3), supra, provides that when the recorder of deeds is required or authorized by law to record, copy, file, recopy or index any document or written instrument, he may do so by photostatic, photographic, microphotographic, microfilm or other similar mechanical process which produces a clear, accurate and permanent copy of the original. The reproductions so made may be used as permanent records of the original.

In the event a recorder of a third-class county were to adopt microfilming as the system of recording all instruments required or authorized by law to be recorded in his office, he could not use the "marginal release of deeds of trust" record for showing the information therein required by Section 59.255, supra, regarding the marginal release of microfilm-recorded deeds of trust as there cannot be any marginal release of such documents. Section 109.120 (3), supra, specifically provides that the release, assignment or other instrument affecting a previously microfilm-recorded instrument may not be made by marginal entry but shall be filed as a separate instrument in a separate book, cross-indexed to the instrument it affects.

Although there could not legally be marginal release of deeds of trust as to those recorded after the recorder had adopted microfilming as the system of recording all instruments, required or authorized to be recorded, he would not be relieved of the duty of keeping the marginal release of deeds of trust record imposed by Section 59.255. After adoption of that system, there would still be many previously nonmicrofilm-recorded deeds of trust unsatisfied on the record in such county, which may be released by a marginal entry.

Obviously there will continue to be marginal releases of deeds of trust for an indeterminate period of time in

Honorable Charles P. Moll

the future, and as long as there are deeds of trust non-microfilm-recorded in his office, which may be released on the margin of the record, it will continue to be the duty of the recorder of a third-class county to keep the "marginal release of deeds of trust" record, and to make the required entries therein whenever the circumstances regarding a particular deed of trust justify it as provided by said Section 59.255, supra.

As long as the recorder keeps said marginal release of deeds of trust, he shall be paid the compensation of one thousand dollars per year for his services in keeping such record. Thereafter, he shall no longer keep said record nor shall he be paid the one thousand dollars per year for keeping of such record.

CONCLUSION

Therefore, it is the opinion of this office that a recorder of deeds of a third-class county, who keeps the marginal release of deeds of trust record and receives one thousand dollars additional compensation per year for his services, as provided by Section 59.255, RSMo 1959, adopts microfilming as the system of recording all instruments required or authorized by law to be recorded in his office under provisions of Section 109.120 (3), RSMo Cum. Supp. 1963, is not relieved of the duty of keeping the marginal release of deeds of trust record. As long as previously nonmicrofilm-recorded deeds of trust, capable of being released by marginal entry, remain unsatisfied of record, said recorder shall continue to keep the marginal release of deeds of trust record and receive the compensation provided by Section 59.255, RSMo 1959. When all previously nonmicrofilm-recorded deeds of trust, capable of being released by marginal entry have been satisfied of record, the recorder shall cease to keep the marginal release of deeds of trust record and shall not be paid any further compensation for keeping said record.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

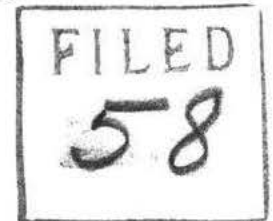
STATE BOARD OF COSMETOLOGY: The State Board of Cosmetology may
RULES: issue reasonable regulations: (1) pre-
REGULATIONS: scribing the course of study in a
ADMINISTRATIVE LAW: licensed school; (2) prescribing the
COSMETOLOGY: minimum floor space for obtaining and
keeping a school license; (3) requir-
ing advertising by schools to be non-

deceptive so that work done by students must be advertised as such;
(4) prescribing a reasonable examination for applicants for school
licenses; (5) prohibiting the use of brush curlers in licensed
schools and shops if it is impracticable to keep them sanitary or
making reasonable sanitary requirements.

The State Board of Cosmetology has not been authorized by statute
to make regulations: (6) prohibiting a licensed school owner from
having a licensed shop; (7) requiring a shop owner who teaches an
apprentice to be a licensed instructor.

OPINION NO. 58

May 15, 1964



Mrs. Jakaline McBrayer, Executive Secretary
Missouri State Board of Cosmetology
Rooms 127-128-129, Capitol Building
Jefferson City, Missouri

Dear Mrs. McBrayer:

In three letters addressed to this office you requested
the opinion of this office on various questions pertaining to
the extent of the power of the State Board of Cosmetology to
make rules and regulations.

In general, an administrative agency has the power to make
any reasonable rule or regulation, which it is expressly authorized
to make by statute or which is authorized by necessary and
reasonable implication of the statute.

This general rule is stated at 1 Am. Jur. 2d, Administra-
tive Law, §97, p. 894:

"The power of administrative agencies to make
rules and regulations does not depend for its
existence solely upon express grant. The
authority of an administrative agency to adopt
reasonable rules and regulations, which are
deemed necessary to the due and efficient exer-
cise of the powers expressly granted, cannot
be questioned. This authority is implied from
the power granted."

Mrs. Jakaline McBrayer, Executive Secy

Missouri follows the general rule as shown by State ex rel. Springfield Warehouse & Transfer Company v. Public Service Commission, (Mo. App.) 225 SW2d 792, at 794:

" . . . the adoption of such a rule by respondent can only be legally authorized upon the grounds that the Legislature has directly, or by necessary or reasonable implication, authorized the same. Respondent has no power except that granted by its creator." [Emphasis ours]

The State Board of Cosmetology is expressly granted the power to make rules by: Section 329.100, RSMo, regarding the conduct of examinations; Section 329.210, RSMo, to prescribe sanitary rules; and, Section 329.230, RSMo, governing the board's internal workings. In addition, the board has the implied power to make reasonable rules and regulations necessary to efficiently exercise the powers expressly granted to the board by Chapter 329, RSMo.

Any reasonable rule or regulation adopted by the board which is within the authority granted the board either expressly or by necessary implication shall have the effect of law after the rule or regulation has been filed with the Secretary of State for the notice period required by Section 536.020, RSMo, 1959.

Violation of such rule or regulation is cause for which the board has the power to refuse to issue a certificate to an applicant or to revoke or suspend an existing certificate under Section 329.140(7), RSMo 1959.

With the general principle in mind that board rules and regulations must be (a) within the power granted the board, expressly or by necessary implication, and (b) reasonable, we come now to the application of this principle to the specific matters which were raised in your letters.

The first question you ask may be restated as follows:

- (1) Does the Board of Cosmetology have the power to prescribe the course of study in licensed schools by rule or regulation?

Such a rule will be valid if it is reasonably designed to carry out the provisions of Chapter 329, RSMo, and more specifically, Section 329.040(2), RSMo, which sets the minimum standards of the course of study, which the school must be able to supply students for the classified occupation of hairdresser, cosmetologist and manicurist.

Mrs. Jakaline McBrayer, Executive Secy

This section specifies a minimum number of hours that must be devoted to instruction of each student in order to attain the skills required of a qualified practitioner set out in Section 329.020, RSMo. Courses must be given in the subjects listed in such section. In order to assure the proper training of students in schools in such subjects, the board has the power to specify the minimum length of time that must be devoted to each subject in order for the student to become a reasonably proficient licensee. These regulations would be authorized in order to carry out the purpose of the law to afford reasonable protection to the public at the hands of a licensee.

(2) Does the Board of Cosmetology have the power to prescribe by rule the minimum amount of floor space for a person to obtain and keep a school license?

This question is closely related to the previous question. The minimum floor space requirements prescribed by board rule must be reasonable. In determining reasonableness, the board may consider its power to prescribe sanitary requirements under Section 329.210, RSMo, and its power to require a course of study in schools under Section 329.040, RSMo.

It is not unreasonable for the board to require a school to have enough area to properly teach its students theory and practice under conditions safeguarding the health of students and the public. Therefore, a rule prescribing minimum floor space to obtain or keep a license is authorized.

(3) Does the Board of Cosmetology have the power to require by rule or regulation that the advertisement of prices of student work by schools specify that such work is to be done by students?

Advertising by schools of prices of work to be done by students without specifying that the work is to be done by students would be deceptive advertising. A student is not a qualified operator and the public has a right to know that the work for which the public is to expend money is to be done by a student rather than an expert.

The board is authorized by Section 329.140, RSMo, to make such a rule. The statute gives the board power to refuse to issue, revoke or suspend a license of a school for:

Mrs. Jakaline McBrayer, Executive Secy

"(8) Advertising by means of any false or deceptive statements knowingly made."

Since the board is given the power to refuse, revoke or suspend a school license for such advertising, it necessarily follows that the board may regulate such false or deceptive advertising by schools in order to carry out the purpose of the law.

(4) Does the Board of Cosmetology have the power to prescribe by rule a reasonable examination to determine the ability of applicants for school license?

Applicants for registration under Chapter 329, RSMo, are required to pass an examination to the satisfaction of the board by Section 329.050, RSMo, which provides in part:

"1. Applicants for . . . registration under this chapter shall possess the following qualifications: . . .

(3) They shall have passed an examination to the satisfaction of the examining board."

This statute does not specifically limit these qualifications to only those persons applying for a license to practice the classified occupations of cosmetology, hairdressing, manicuring. The statute includes all applicants for registration.

The requirement of an examination for applicants for school registration would be in the public interest if the examination is designed to determine the ability of a person applying to be licensed as a school. Therefore, the board is empowered to require an examination for applicants for a certificate of registration for a school to teach any of the classified occupations. The examination required by the board must be calculated to determine the ability of a person applying for a license to properly operate a licensed school. Otherwise it would be unreasonable.

(5) May the Board of Cosmetology prohibit the use of brush curlers in licensed schools and shops?

Mrs. Jakaline McBrayer, Executive Secy

Under Section 329.210, RSMo, the board has the power to issue such reasonable sanitary rules as it deems necessary. If it is impracticable to use brush curlers in a sanitary manner, then a regulation prohibiting their use would be authorized by this section as promoting sanitation. On the other hand, if it were practicable to use such brush curlers in a sanitary manner, then a regulation prohibiting their use would be unreasonable since it would be outlawing the use of an article not inherently unsanitary and would be infringing on property rights unnecessarily. If such be the case, a regulation requiring brush curlers to be kept in a sanitary condition would be reasonable and serve the same end as prohibition.

(6) Does the Board of Cosmetology have the power to prohibit by rule a school owner from having a shop?

The board is not authorized to make such a rule. However, the board may proceed in this regard to require by rule that a shop and a school be kept separate and apart.

There is no prohibition in Chapter 329, RSMo, on the number or types of licenses a person may obtain. The chapter does distinguish between a school and a shop. There are different licenses for schools than there are for shops. Therefore, it follows that a shop and a school are not the same.

Nor may a school and a shop be in the same part of the same building but must be separate and apart because Section 329.010, RSMo, defines a shop as "that part of any building wherein or whereupon any of the classified occupations are practiced." The classified occupations are not practiced in a school. They are taught there.

Further, although Section 329.040(3), RSMo, permits a shop owner to teach apprentices in his shop without being required to obtain a school license, such shop owner may not hold himself out as a school. If he holds himself out as a school he must register as a school.

Therefore, although the same person may be licensed to have a school and a shop, a school may not be in a shop, and a shop may not be in a school; they must be kept separate and apart.

(7) May the Board of Cosmetology require by rule that a shop owner, who teaches an apprentice, be a licensed instructor?

Mrs. Jakaline McBrayer, Executive Secy

This question was answered in the negative in an opinion of this office under date of October 5, 1959, addressed to Mrs. Jakaline McBrayer, which is enclosed. This office continues to be of the same opinion.

CONCLUSION


It is the opinion of this office that the Board of Cosmetology has the power to issue reasonable rules and regulations within the power granted the board expressly or by necessary implication.

More specifically, the board may issue reasonable regulations: (1) prescribing the course of study in a licensed school; (2) prescribing the minimum floor space for obtaining and keeping a school license; (3) requiring advertising by schools to be non-deceptive so that work done by students must be advertised as such; (4) prescribing a reasonable examination for applicants for school licenses; (5) prohibiting the use of brush curlers in licensed schools and shops if it is impracticable to keep them sanitary or making reasonable sanitary requirements.

The board has not been authorized by statute to make regulations: (6) prohibiting a licensed school owner from having a licensed shop; (7) requiring a shop owner who teaches an apprentice to be a licensed instructor.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

Yours very truly,

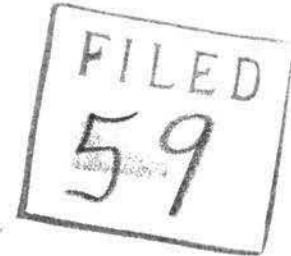

THOMAS F. EAGLETON
Attorney General

Enc.

BOARD OF COSMETOLOGY: Members of Board of Cosmetology cannot be
COSMETOLOGY: compensated for conducting examinations.
COMPENSATION:

Opinion No. 59

January 22, 1964



Mrs. Jakaline McBrayer
Executive Secretary
State Board of Cosmetology
Rooms 127-128-129, Capitol Building
Jefferson City, Missouri

Dear Mrs. McBrayer:

Your letter of December 5, 1963, requesting an opinion concerning examinations may be restated as follows:

In lieu of hiring examining assistants may the board conduct the exams personally and receive compensation for such work?

Section 329.210, RSMo 1959, provides that the board shall have power to:

"(2) To conduct examination of applicants for license to practice, . . . and

"(3) . . . to appoint. . . if necessary, examining assistants."

It is clear from this section that the board has the power to conduct the exams and that they should do so personally unless it is necessary to appoint assistants.

The general rule relating to the propriety of a public official receiving compensation for official duties was stated in *Nodaway County v. Kidder*, 129 SW2d 857, 1.c. 860:

"It is well established that a public officer claiming compensation for official duties performed must point out a statute authorizing such payment."

Mrs. Jakaline McBrayer, Executive Secy

There is no provision in the statutes authorizing such payment of compensation for the conduct of examinations, hence the board may not be compensated for same.

The only compensation the board can receive is provided for in Section 329.190, RSMo 1959:

"2. The members of the board shall receive as compensation for their services the sum of fifteen dollars for each day actually spent in attendance at meetings of the board, within the state, not to exceed twenty-four days in any calendar year and in addition thereto they shall be reimbursed for all necessary expenses incurred within the state in the performance of their duties as members of the board. The first board shall meet in Jefferson City on the second Monday following their appointment by the governor."

This statute does permit reimbursement for all necessary expenses incurred in performing their duties. Therefore, the board may receive travel, lodging, food and other necessary expenses incurred for such conduct of examinations.

CONCLUSION

It is the opinion of this office that Board of Cosmetology members may not be compensated for conducting examinations.

The foregoing opinion which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JDF:df

January 16, 1964

FILED

61

Opinion No. 61
Answered by Letter

Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County
Mayaville, Missouri

Dear Mr. Paden:

This will acknowledge your letter dated January 8, 1964, in which you request the opinion or advice of this office concerning the liability of the State of Missouri for certain criminal costs.

We have inquired of the Comptroller with respect to the specific case to which you refer, State of Missouri v. Leo Harper. It appears that in that case the defendant was convicted and sentenced several years prior to the date of Mr. Trigg's form letter of January 10, 1962, so that in any event it could not be said that the circuit clerk of your county was misled by the letter of January 10, 1962.

Mr. Trigg's letters both had reference to the situation where a defendant has been convicted and sentenced and thereafter paroled. It does not pertain to the situation resulting from a suspension of sentence.

As Mr. Trigg pointed out in his letter of January 10, 1962, Section 549.150, RSMo makes it the duty of the court granting the parole to require the payment of the costs or security therefor unless the person paroled is insolvent. Moreover, the same section further provides that if the defendant at any time prior to final discharge becomes able to pay the costs, it is the duty of the court to require the costs to be paid before granting a discharge. It was for that reason that Mr. Trigg suggested that "whenever possible" the circuit clerk hold the bill of costs until the defendant is discharged or the parole revoked, so that the State

Honorable Robert B. Paden

would pay only that portion of the costs which the court had been unable to obtain from the defendant in the discharge of the court's duty to require the costs be paid.

It is true that Mr. Trigg used the term "final disposition of the case", but the letter makes it clear that what he had in mind was not the technical meaning of that phrase at all. In his subsequent letter of July 23, 1962, Mr. Trigg clarified his earlier letter to make clear what he meant by the words "whenever possible". In his letter of July 23, 1962, Mr. Trigg cautioned the circuit clerks that under the provisions of Section 33.120 RSMo, any fee bill received more than two years after the date of judgment and sentence could not be paid by the State.

Reading the two letters together, it was obviously Mr. Trigg's intention to request the clerks that in the event the defendant is convicted and sentenced and thereafter placed on parole, the clerk should withhold sending the fee bill to the State for payment in order to enable the court in the meantime to comply with its duty to require the parolee to pay the costs, but that if the costs have not been paid by the defendant at the end of some reasonable period prior to the expiration of the 2-year period of limitations, the fee bill for any balance of costs then remaining for which the State would be liable should be sent to the Comptroller's office for payment. That is, it would be advisable to withhold sending the fee bill for a period of 18 to 20 months after the date of conviction and sentence, but in no event longer than two years. We believe that the Comptroller's request, as clarified by his letter of July 23, 1962, is a reasonable one, and accords with the law.

In your letter, you expressed the view that the letter of July 23 overruled the previous letter (but, as indicated above, we believe it merely clarified it) and also "apparently overruled the case of Cramer v. Smith, 168 S.W.2d 1039." In our view, the letter of July 23, 1962, is entirely consistent with the Cramer case. The Cramer case simply held that the 2-year statute of limitations with respect to filing claims against the State "does not begin to run against criminal costs taxable against the State until such costs shall have accrued," and that they do not accrue until "final determination of the case." The facts there involved were that the defendant had been convicted of a capital

Honorable Robert B. Paden

offense and thereafter appealed. The conviction was reversed and the case remanded for a new trial. In this situation, the Court rightly held that the case had not been finally "determined" within the meaning of the statute making the State liable for costs. It was held that the term "determined" has reference to the termination of the case with finality.

Insofar as the defendant Leo Harper was concerned, the case against him was finally determined long ago. His judgment of conviction, unappealed from, brought the case to an end. On several occasions our courts have held that the granting of a parole is no part of the trial of the cause and is not an incident to the conviction. This was the holding in State ex rel. Browning v. Kelly, 309 Mo. 465, 274 S.W. 731 and State v. Merk, Mo. App., 281 S.W.2d 607.

In the Kelly case, the Court specifically stated that the granting of a parole has nothing to do with the ascertainment of guilt or innocence and that "an application for parole cannot be entertained until after a judgment of conviction has been rendered * * * and that judgment has become a finality." The Court there pointed out that the judgment of conviction entered upon the plea of guilty of the defendants constituted "a final determination of the cause." The basis of rulings of such nature is that after the judgment and sentence has been entered, the case has been finally disposed of and that the granting of the parole thereafter constitutes a proceeding separate and apart from the case itself. This is true whether or not the parole is thereafter revoked and the sentence executed.

By way of contrast, where the imposition of sentence is suspended and the defendant is placed on probation, the 2-year period of limitations does not commence to run, for the obvious reason that the judgment is not final and there is no "final determination of the cause". Of course, in that situation, the State is not liable for the costs unless and until there is a final determination of the cause. We enclose herewith copy of opinion of this office dated December 13, 1962, to Honorable Charles D. Trigg, Comptroller and Budget Director, which rules the latter situation.

Honorable Robert B. Paden

Legally, the circuit clerk has the right (as you indicated) to bill the State for the accrued costs at the time the defendant is granted a parole and the defendant is then insolvent. However, it would not be necessary to do so at such time in order to avoid the statute of limitations, for the reason that the statute of limitations would not expire for a period of two years after the date of judgment and sentence. Moreover, in view of the mandatory duty placed by the statute upon the court granting the parole to require the payment of costs if the defendant should become able to do so, we do not believe that either the court or the circuit clerks will fail to comply with their duties in effecting collection of costs.

As we see it, the basic misconception of your letter is the belief that the final determination of the case does not result until the parole is revoked and the sentence executed. On the contrary, when a defendant is paroled, the case is finally determined at the time the defendant is convicted and sentenced, inasmuch as parole is permissible only after a final determination of the case.

We trust that the views expressed herein will be of assistance to you.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN:hm

Enclosure

COUNTY COURTS: County courts do not have authority to regulate
ELECTIONS: time standards to be used in the county. County
TIME: court is without power to order or conduct an
election for adopting a uniform time standard
for the county.

February 24, 1964

Opinion No. 62

Honorable C. M. Bassman
Representative, Gasconade County
9th and Gutenberg
Hermann, Missouri



Dear Representative Bassman:

This opinion is issued in response to your request of January 8, 1964, for an official opinion of this office. You inquire:

"Would it be legal for our County Court to pass a law, or ordinance, setting up a uniform time for Gasconade County only and if so, would such an ordinance be binding on all the residents of the county whether rural or urban? If this is not possible, could the Court call a County election for this said purpose and if so, would the results of this election then be binding on all citizens alike?"

County courts do not have inherent powers but must premise their actions upon some legislative grant of authority.

"It has been held uniformly that county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. They have only such authority as is expressly granted them by statute." King v. Maries County, Mo., 249 SW 418, 420.

Accord: Bradford v. Phelps Co., Mo. 210 SW2d 996, 999.

Hon. C. M. Bassman

We have searched for statutes which would empower county courts to regulate time standards. We do not find any such statutes. Hence, we must rule that county courts do not have the power to regulate time standards for the county. Enclosed herewith is Opinion No. 13 (1954) of this office issued to Honorable Hilary A. Bush, County Counselor, Kansas City, Missouri on June 18, 1954. This opinion is in accord with our present ruling and further discusses the county court's lack of power to regulate public health, safety or welfare without statutory authority.

You further inquire whether the county court has the power to call an election for adopting a uniform time standard. As we have noted above, the county court has only such powers as are granted by statute. Although the county courts are empowered by statute to order certain elections (for example: Sections 59.070, 77.050, 108.040, RSMo 1959) we do not find any statute authorizing county courts to order an election for adopting a uniform time standard. Thus, the county court does not have such authority.

Furthermore, the Supreme Court of Missouri has ruled that no election can be held unless it is specifically provided for by law. State v. Hawk, Mo., 228 SW2d 785, 787; State v. Ellison, Mo., 196 SW 751, 752. We know of no statute providing for an election to be held for adopting a uniform time standard. Indeed, the absence of such evidently prompted House Bill No. 433 of the 72nd General Assembly which proposed such an election. However, since House Bill No. 433 did not become law, there is no statutory authority for conducting an election to adopt a uniform time standard.

Enclosed herewith is Opinion No. 40 (1956) issued to Honorable Forrest L. Hill, Prosecuting Attorney, Howard County, Fayette, Missouri on October 19, 1956, which is in accord with the foregoing conclusions.

CONCLUSION

Therefore, it is the opinion of this office that county courts do not have authority to regulate time standards to be used in the county. It is further our opinion that the county court is without power to order or conduct an election for adopting a uniform time standard for the county.

Hon. C. M. Bassman

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo, Jr.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

March 6, 1964



Honorable Frank Conley
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Mr. Conley:

This is in answer to your letter in which you inquire whether the payment for former Probate Judge Howard B. Lang, Sr., under Section 27 of Article V of the Constitution of Missouri, should be handled as a separate budget item or should be included in the budget for the probate court.

It is our view that the payment of half of the probate judge's salary which former Judge Lang is entitled to under the provisions of Section 27 of Article V of the Constitution should be budgeted separately from the probate court budget items.

The payment to Judge Lang under the constitutional provision is not made because of any service he renders at the present time to the probate court or concerning probate proceedings. In the case of *State ex inf. Dalton v. Russell*, 281 S.W. 2d 781, the Supreme Court held that a circuit judge retired under such constitutional provision was not a judge after he was so retired. We, therefore, believe that Judge Lang has no connection with the probate court at the present time and that his pay is granted him not because of any function he has relating to the probate court but by virtue of the constitutional provision itself.

Page 2
Honorable Frank Conley

Therefore, it is our view that the budget should include an item for payment of the amount due Judge Lang under the constitutional provision separate and apart from the budget items for the probate court.

Inasmuch as Judge Lang is not now a county officer and his compensation is being paid by virtue of the constitutional provision, such payment should not be in class four of the budget, but should instead be either in class five or class six of the county budget. Class five includes contingent and emergency expenses of the county and class six includes payment for any lawful purpose. In view of these provisions it would be proper to budget the payment for Judge Lang under either class five or class six of the budget.

Yours very truly,

CBB/fh

THOMAS F. EAGLETON
Attorney General

CRIMINAL LAW:
CRIMINAL PROCEDURE:
CONSECUTIVE SENTENCE:
CONCURRENT SENTENCE:
SENTENCING:
DEPARTMENT OF CORRECTIONS:

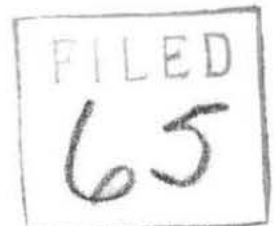
1) That portion of Section 222.020, RSMo 1959, which provides that sentences must be cumulative in certain instances, does not apply when the defendant already under sentence to the custody of the Department of Corrections, is convicted of another crime committed prior to imposition of the sentence which he is serving.
2) Where no statutory requirement to the contrary applies, it is within the discretion of a court imposing sentence to the custody of the Department of Corrections to determine whether or not it shall be served consecutive to or concurrent with prior sentences to the same department.

March 23, 1964

OPINION NO. 65

Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Mr. Burrell:



This is in response to your request for an opinion concerning application of a portion of Section 222.020, RSMo 1959.

The inquiry concerns an individual who committed a crime in Barry County, was convicted therefor and sentenced to a term in custody of the Department of Corrections which he is now serving. A charge is pending against him for a crime committed in Greene County at about the same time as the one in Barry County but before he was sentenced thereon. The crime charged in Greene County is one punishable only by commitment to the custody of the Department of Corrections.

You present two questions in anticipation of conviction for the crime in Greene County:

1. Must the judge order the new sentence to run consecutive to the one being served in view of Section 222.020, RSMo 1959?
2. May the new sentence be served concurrently with the present one?

Unless there is some statutory provision to the contrary (such as the one discussed here), it is generally within the discretion of a court imposing sentences to the custody of the Department of

Corrections to determine whether or not they shall be served consecutive to or concurrent with prior sentences to the same department. State v. Shell, 299 SW2d 465, 467[3]; Williford v. Stewart, 198 SW2d 12, 14[2].

As pertains to your inquiry, Section 222.020, provides:

"* * * and if any convict commits any crime in an institution of the department of corrections, or in any county of this state while under sentence, the court having jurisdiction of criminal offenses in the county shall have jurisdiction of the offense, and the convict may be charged, tried and convicted in like manner as other persons; and in case of conviction, the sentence of the convict shall not commence to run until the expiration of the sentence under which he is held.* * *"
(Emphasis added.)

The statute directs that service of a second sentence to the custody of the Department of Corrections cannot commence until expiration of a prior sentence thereto if the second crime is committed at a time when the accused was already under sentence for the first crime. However, as you point out in your opinion request, there is some inconsistency in the language of State v. Campbell in construing this law. At 307 SW2d 486, 490[3], the Supreme Court appears to be saying that the two sentences must be served consecutively where the accused is convicted of a second offense while already under another sentence.

The language of the court in Campbell at l.c. 490 is:

"* * * Section 222.020 provides that if a convict 'while under sentence' shall be convicted of another criminal offense, the sentence of the later conviction 'shall not commence to run until the expiration of the sentence under which he may be held.'"
(Emphasis added.)

Nevertheless, the court goes on to express what is at issue and is decided in the case as follows:

"The fact that the defendant was on parole and not confined to the penitentiary at the time of the commission

of the second offense did not prevent the application of section 222.020 because, as held in *Herring v. Scott*, Mo., 142 N.W.2d 670, 671[2]: 'The fact that he was out on parole when the second offense was committed, did not make him any the less "under sentence" for the first offense.' (Emphasis added.)

Thus, the court recognizes that it is the commission of the second offense with relation to the time of sentencing for the first offense which is controlling. If the second offense is committed after the accused has been sentenced for the first offense, then the statute dictates that the term of imprisonment for the second offense shall not commence to run until the expiration of the term of imprisonment for the first offense.

Herring v. Scott, 142 SW2d 670 (En Banc), interprets the legislative intent in formulating this provision as follows, l.c. 672:

"They were contemplating a situation where a convict under sentence for one felony commits another perhaps of a different kind and at a remotely later time. They saw fit to require that in event of conviction of the latter, the sentence therefor should not commence to run until the convict had fully paid his debt to the State for the first. Having so declared in a solemn legislative act, we are not at liberty to amend it by construction." (Emphasis added).

Under the facts presented Section 222.020, RSMo 1959, requiring cumulative punishment in certain circumstances, does not apply. The court, in the event of conviction, may in its discretion, impose either a consecutive or a concurrent term of punishment in the custody of the Department of Corrections.

CONCLUSION

I.

That portion of Section 222.020, RSMo 1959, which provides that sentences must be cumulative in certain instances, does not

apply when the defendant already under sentence to the custody of the Department of Corrections, is convicted of another crime which was committed prior to imposition of the sentence which he is serving.

II.

Where no statutory requirement to the contrary applies, it is within the discretion of a court imposing a sentence to the custody of the Department of Corrections to determine whether or not it shall be served consecutive to or concurrent with prior sentences to the same department.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Howard L. McFadden.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

BONDS:
REVENUE BONDS:
NURSING HOMES:
COUNTY COURTS:

The county court has authority under Section 205.375, RSMo 1959, to issue revenue bonds for the purpose of acquiring land and sites for nursing homes.

March 6, 1964

OPINION NO. 67



Honorable Thomas D. Graham
Speaker, House of Representatives
201-204 Monroe Building
235 East High Street
Jefferson City, Missouri

Dear Mr. Graham:

This is in response to your request dated January 13, 1964, for an official opinion, which reads as follows:

"I should like to know whether or not, under the provisions of Section 205.375, RSMo 1959, a county court may issue revenue bonds for the purpose of acquiring sites for nursing homes as well as providing funds for the construction and equipping of said homes."

The pertinent part of Section 205.375, RSMo 1959, is as follows:

"* * * 2. The county court of any county or the township board of any township may acquire land to be used as sites for, construct and equip nursing homes and may contract for materials, supplies, and services necessary to carry out such purposes.

"3. For the purpose of providing funds for the construction and equipment of nursing homes the county courts or township boards may issue bonds as

authorized by the general law governing the incurring of indebtedness by counties, or may provide for the issuance and payment of revenue bonds in the manner provided by and in all respects subject to chapter 176, RSMo, which provides for the issuance of revenue bonds of state educational institutions. * * *

This office in opinion No. 11, dated May 29, 1963, to J. W. Colley, has held that Section 205.375 authorizes the county court to acquire land for the purpose of being used as a location for the construction of a nursing home. Said opinion further held that the county could issue general obligation bonds for the purpose of the purchase of an existing rest home to be used as a county nursing home.

It is clear from subparagraph 2 of Section 205.375, that the county is authorized to acquire land to be used as a site for a nursing home as well as to construct and equip a nursing home, and may also acquire materials, supplies, and services necessary to construct and equip a nursing home. Subparagraph 3 of said Section 205.375, expressly authorizes the county court to provide funds for the "construction and equipment of nursing homes" and to issue both general obligation bonds and revenue bonds subject to Chapter 176, RSMo, to carry out these purposes. It is manifest that the Legislature omitted to expressly provide in Section 205.375 for the financing by the issuance of bonds for the acquisition of land and sites for nursing homes. Generally, if the power to issue bonds to acquire sites has not been granted by the statutes, then the power does not exist. *Meyers v. Kansas City*, 323 Mo. 200, 18 SW2d 900; *Horsefall v. School District, City of Salem*, 143 Mo. App. 541, 128 SW 33.

The problem then is did the Legislature intentionally decline to grant power to the county court to finance the acquisition of land and sites for nursing homes by the issuance of revenue bonds.

It will be noted that the Legislature, in subparagraph 3 of Section 205.375, provided ". . . or may provide for the issuance and payment of revenue bonds in the manner provided by and in all respects subject to Chapter 176, RSMo, . . ."

Honorable Thomas D. Graham

The use of this language requires an examination of the provisions of Chapter 176 to ascertain the legislative intent in this respect. Chapter 176 relates to the issuance of revenue bonds to state educational institutions, and Section 176.020, RSMo 1959, contains the following language:

"1. Any state educational institution of the state of Missouri, as herein defined, shall have the power, acting through its governing body, to acquire, construct, erect, equip, furnish, operate, control, manage and regulate a project, * * *." (Emphasis ours.)

Further, under subsection 2 of said Section 176.020, is the following language:

"2. Such state educational institutions shall have the further power to use real property now or hereafter belonging to such educational institution as a site for any such project, or to acquire by purchase, lease, gift or otherwise such real or personal property as in the judgment of the governing body of such educational institution shall be necessary, advisable and suitable for such purpose." (Emphasis ours.)

Further, in Section 176.030, is the following language:

"For the purpose of providing funds for the acquisition, construction, erection, equipment and furnishing of any such project, and for providing a site therefor, as herein provided, the governing body of such educational institution shall have the power to issue and sell revenue bonds, as herein defined, * * *." (Emphasis ours.)

It therefore appears from the above quoted provisions of Chapter 176, that the Legislature expressly authorized the governing body to finance the acquisition of sites and land with the sale of revenue bonds. Therefore, when the Legislature made Section 205.375, "in all respects subject to

Honorable Thomas D. Graham

Chapter 176," it intended to give the county court the same power and authority which educational institutions have respecting the legitimate purposes for which revenue bonds may be used to finance nursing homes.

CONCLUSION

The county court has authority under Section 205.375, RSMo 1959, to issue revenue bonds for the purpose of acquiring land and sites for nursing homes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

INSURANCE: Articles of Incorporation of First American Security
Life Insurance Company

OPINION NO. 68

January 16, 1964



Honorable Ralph H. Duggins, Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

Receipt is acknowledged of your letter of January 14, 1964, with which you submitted to this office an executed copy of Articles of Incorporation, including a Declaration of Intention of original incorporators, of the proposed First American Security Life Insurance Company of Missouri. Also forwarded with your request for an opinion concerning the documents heretofore referred to was proof of publication of the same as required by Section 376.070 RSMo 1959.

Attention is directed to the acknowledgment appended to the Articles of Incorporation disclosing the place of acknowledgment as being in Scott County, Missouri, and showing a seal of the Notary Public as authorizing the acknowledgment to be taken in Green County, Missouri. We do not feel that this apparent irregularity will cause the Articles of Incorporation to be fatally defective.

With the exception noted in the preceding paragraph, an examination of the documents referred to in the first paragraph of this letter has been made as required by Section 376.070 RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Sections 376.010 to 376.670 RSMo 1959, as amended, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO/dg

February 14, 1964



Opinion No. 69
Answered by Letter

Honorable Charles P. Moll
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Moll:

This is in response to your recent request for an opinion concerning Section 229.180, RSMo 1959. This section provides:

"No auto wrecking yard or junk yard shall be established, maintained or operated within two hundred feet of any state or county road
* * *

unless it is screened as provided by said statute. The location of the junk yard is below the level of the highway so that it is impractical to screen the junk yard from the view of persons on the highway. The statute is violated because the junk yard is established, maintained or operated within two hundred feet of the highway without screening. The provision relative to screening is an exception to the general prohibition and permits operations within two hundred feet of the highway if it is in fact screened as provided. The impracticality or cost of screening is immaterial.

Your question is: What action can the prosecuting attorney take?

Section 229.190 declares the violation of Section 229.180 a misdemeanor and Section 229.200 provides the penalty for such violation. Hence, you can file an information charging the misdemeanor.

Honorable Charles P. Moll

Second, you may desire to consider bringing an injunction suit for the abatement of a public nuisance. For general principles involved in such an action, you may consult State ex rel Collet v. Errington, 317 SW2d 326.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

May 25, 1964



Honorable Norman J. Williams
Prosecuting Attorney
Miller County
18 South Maple Street
Eldon, Missouri

Dear Mr. Williams:

You have inquired of this office whether the prosecuting attorney's office is permitted to budget for the upkeep of a law library for the prosecuting attorney which budget would include the purchase of supplements and pocket parts. You have also inquired as to what classification these purchases should be budgeted under, if they are to be allowed.

I am enclosing for your information copies of two opinions of this office, one dated March 11, 1953, to the Honorable E. C. Westhouse, Fredericktown, Missouri, regarding the duty of counties to furnish legal publications for the office of the probate judge, and one dated April 18, 1952, to the Honorable Jerry B. Schnapp, Fredericktown, Missouri, regarding the authority of a county to maintain a law library for the use of the circuit judge, prosecuting attorney and members of the county bar.

In specific answer to your question, it is the opinion of this office that the purchase and upkeep of a law library for the office of the prosecuting attorney may be lawfully budgeted under the county budget laws. The budgeting of this library, however, will fall under two classifications of proposed expenditures. It is our opinion that the items of permanent additions to the library, which would include such items as Vernon's Annotated Missouri Statutes, Black's Law

Honorable Norman J. Williams

Dictionary, and other books of a like nature, would fall under the classifications of " . . . furniture, office machines and equipment of whatever kind" as listed as an exception in Section 50.680, class 4 expenditures, and should therefore be budgeted under the class 6 expenditures.

The purchase of supplements, pocket parts, and current publications, in our opinion, are included within the term supplies for current office use and of an expendable nature and therefore would be included in expenditures of the fourth class.

Put another way, it is proper to budget for the purchase of law books (i.e., Southwestern Reporters, Missouri Digest, Corpus Juris Secundum) in the prosecuting attorney's office under class 6 of the County Budget Law. The purchase of pocket parts (i.e., yearly pocket parts for Missouri Digest, Vernon's Annotated Missouri Statutes, etc.) and pamphlets of a current and expendable nature are properly classified under class 4 of the County Budget Law.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

RRN:lt
Enclosures 2

BANKS:
TREASURER:
STATE TREASURER:
STATE DEPOSITORY:
DEPOSITARIES:
STATE MONEYS:
CONSOLIDATION OF BANKS:

When two banks having state depository contracts consolidate, unnecessary to execute depository contract with consolidated bank.

Opinion issued per telephone request.

Opinion No. 72

January 17, 1964



Honorable Milton Carpenter
State Treasurer
Office of State Treasurer
Capitol Building
Jefferson City, Missouri

Attention: Mr. M. Gene Lindsey

Dear Sir:

In a conference with Mr. Lindsey on January 10, 1964, your office submitted to us the Agreement of Consolidation between the Tootle-Enright National Bank and The American National Bank of St. Joseph, together with State Depository Contracts between the state treasurer and each of said banks. We were informed that the authorized deposit by the state treasurer in the Tootle-Enright Bank was \$450,000 under said depository contract, and the authorized deposit under the depository contract with The American National Bank of St. Joseph was \$200,000, that the combined total on deposit by the state treasurer in the consolidated bank amounts to \$375,000 at the present time. You have asked us to advise you whether or not the state treasurer must enter into a new depository contract with the consolidated bank.

Section 5 of the consolidation agreement between said banks contains the following language:

"All assets of each of the consolidating banks, as they exist at the effective time of the consolidation, shall pass to and vest in the Association without any conveyance or other transfer; and the Association shall be responsible for all of the liabilities of every kind and description, * * *"

January 17, 1964

Title 12 § 215(e), U.S.C.A. contains the following language:

"The corporate existence of each of the consolidating banks or banking associations participating in such consolidation shall be merged into and continued in the consolidated national banking association and such consolidated national banking association shall be deemed to be the same corporation as each bank or banking association participating in the consolidation. All rights, franchises, and interests of the individual consolidating banks or banking associations in and to every type of property (real, personal, and mixed) and choses in action shall be transferred to and vested in the consolidated national banking association by virtue of such consolidation without any deed or other transfer. The consolidated national banking association, upon the consolidation and without any order or other action on the part of any court or otherwise, shall hold and enjoy all rights of property, franchises, and interests, * * *"

It is, therefore, our opinion that the consolidated bank assumes all obligations and liabilities imposed by each of the depository contracts and in the total amount of both contracts, and the state treasurer is not required to enter into a new depository contract with the consolidated bank.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

BY
J. Gordon Siddens
Assistant Attorney General

JGS:lo

cc: O. W. Watkins, Jr.
St. Joseph, Missouri

P.S. Returned herewith are the documents you delivered to us.

ASSESSORS:

ASSESSMENT OF PERSONAL PROPERTY:

TAXATION:

TAXATION OF PERSONAL PROPERTY:

AGRICULTURAL FIELD CROPS:

1. Section 137.115(2), RSMo 1959, respecting the assessment for taxation of agricultural field crops, does not violate Art. X, Sec. 4 (a) and (b) of the Constitution of Missouri and is constitutional.

2. The taxpayer should claim his right to exemption under Section 137.115 by informing the assessor when taxable personal property consists of agricultural field crops in an unmanufactured condition intended to be used solely as seed or in the feeding of livestock or poultry.

March 9, 1964

OPINION NO. 73

Honorable Thomas E. Caton
State Representative
Holt County
Mound City, Missouri



Dear Mr. Caton:

This office is in receipt of your request for an opinion which asks two questions.

1. The first question may be stated as follows:

"Whether or not subsection 2 of Section 137.115, RSMo 1959, may now be deemed unconstitutional because of the language in the case of Drey vs. State Tax Commission, 345 SW2d 228."

Section 137.115 relates to the time and manner of assessing tangible personal property. Art. X, Sec. 4(a) and Sec. 4(b), Constitution of Missouri, relates to the classifications of taxable property. The case of Drey vs. State Tax Commission, 345 SW2d 228, dealt only with the assessment of real property, and the Drey case holds that there are no subclassifications of real estate for the purposes of taxation. Subclassification of tangible personal property, however, is authorized by the Constitution and has been validly accomplished in Section 137.115.

Honorable Thomas E. Caton

Therefore, in our opinion, Section 137.115 does not violate the constitutional prohibition and is therefore valid and constitutional.

2. Your second question may be stated as follows:

"How should a taxpayer claim his right to preferential tax treatment of agricultural feed crops to be used solely as seed or in the feeding of livestock or poultry under Section 137.115."

Under Section 137.115, the assessor has the duty to ascertain from the taxpayer a list of all his tangible personal property, and this would include agricultural field crops in an unmanufactured condition. If such crops properly fall within this exemption so as to make them taxable at ten per cent of their true value, then the taxpayer can so advise the assessor and claim the exemption. In order to ascertain whether or not the taxpayer is entitled to this exemption, it would be appropriate for the assessor to make inquiries and ascertain the facts.

CONCLUSION

1. Section 137.115(2), RSMo 1959, respecting the assessment for taxation of agricultural field crops, does not violate Art. X, Sec. 4 (a) and (b) of the Constitution of Missouri and is constitutional.

2. The taxpayer should claim his right to exemption under Section 137.115 by informing the assessor when taxable personal property consists of agricultural field crops in an unmanufactured condition intended to be used solely as seed or in the feeding of livestock or poultry.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

March 31, 1964

Opinion No. 75 Answered by Letter
(Eichhorst)

Mr. Proctor N. Carter
Director
Division of Welfare
Jefferson City, Missouri



Dear Mr. Carter:

This is in answer to your letter requesting an opinion of this office as to whether or not the purchase of drugs and medicines from a physician and payment of a \$1.00 handling charge falls within the prohibition against the payment of "physician's fees" in Subsection 6 of Section 208.150, RSMo Cum. Supp. 1963.

The subsection reads as follows:

"Any individual entitled to receive care or services under this section may obtain such care and services from any provider of services with which an agreement is in effect under this section and which undertakes to provide him such care and services, but such agreement shall not include the payment of the attending physician's fees but does include dental fees and services, as authorized by the division of welfare."

This subsection prohibits the payment of the "attending physician's fees". However, there is no prohibition of the payment of charges for physician's services. The limiting language used in the statute of "physician's fees" shows a legislative intent to prohibit only the payment of the doctor's professional examination and attendance charges. This language likewise shows an intent to exclude from its orbit the dispensing of drugs which the doctor may decide to prescribe or may direct the patient to procure. Indeed, the filling of his own prescriptions is a distinct service that may be performed by the physician as provided for by Section 238.010, RSMo 1959.

Mr. Proctor N. Carter

-2-

Therefore, it is the opinion of this office that the cost of drugs, together with a nominal handling charge of \$1.00 paid to an attending physician who dispenses his own drugs, is not to be considered "physician's fees" as that term is used in Sub-section 6 of Section 208.150, RSMo Cum. Supp. 1963.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

TEE:hm

INHERITANCE TAX WAIVERS: If, after the filing of the inventory and
CORPORATE STOCK: appraisement of the estate of the decedent, it is the opinion of the court entered of record that these items are not taxable, then and only then do the provisions of Section 145.210. RSMo become inoperative.

March 6, 1964

Opinion No. 76



Mr. Frank Bild
State Representative
9234 Gravois
St. Louis, Missouri 63123

Dear Mr. Bild:

This is in answer to your request for an opinion from this office which reads as follows:

(Is) "As a notice of time and place of intended transfer of stock to be served upon the Director of Revenue and Attorney General at least ten days prior to said transfer in a situation where the estate of the decedent has been entirely administered upon by the Probate Court and the Probate Court has issued its Order of Discharge to the executor and made its Order of Distribution to the heir. The heir, with a certified copy of this Order of Distribution and Order of Discharge presents the stock of the decedent to the transfer agent of the corporation for transfer to the said heir."

The statement of facts of the opinion request does not indicate whether the court record of the estate of the decedent contains an opinion of the court that the estate is not taxable. Thus, we are obliged to answer in the alternative.

The section in question, §145.210, RSMo reads as follows:

"1. If a foreign executor, administrator, or trustee shall assign or transfer any stock or obligation in this state standing in the name of the decedent or in trust for a decedent liable for any such tax, the tax shall be paid to the director of revenue on the transfer thereof.

"2. No safe deposit company, trust company, corporation, bank or other institution,

Mr. Frank Bild

persons having in possession or under control securities, deposits, or other assets belonging to or standing in the name of a decedent who is a resident or nonresident, or belonging to or standing in the joint names of such a decedent and one or more persons, including the shares of capital stock or other interest in a safe deposit company, trust company, corporation, bank or other institution making a delivery or transfer herein provided, shall deliver or transfer the same to the executor, administrator, or legal representative of said decedent or the survivor or survivors when in the joint name of a decedent and one or more persons or upon their order or request unless notice of the time and place of such intended delivery or transfer be served upon the director of revenue and attorney general at least ten days prior to said delivery or transfer; nor shall any safe deposit company, trust company, corporation, bank or other institution, person or persons, deliver or transfer any securities, deposits, or other assets belonging to or standing in the name of decedent or belonging to or standing in the joint names of decedent and one or more persons, including the shares of capital stock of or any other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer without retaining a sufficient portion or amount thereof to pay any tax or interest which may thereafter be assessed on account of the delivery or transfer of such securities, deposits, or other assets, including the shares of capital stock or other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer under the provisions of this chapter unless the director of revenue and the attorney general consent thereto in writing.

"3. And it shall be lawful for the director of revenue together with the attorney general, personally or by representative, to examine

Mr. Frank Bild

said securities, deposits or assets at the time of such delivery or transfer.

"4. Failure to serve such notice or failure to allow such examination or failure to retain a sufficient portion or amount to pay such tax or interest as herein provided shall render said safe deposit company, trust company, corporation, bank or other institution, person or persons liable to the payment of the amount of the tax and interest due or thereafter to become due upon said securities, deposits, or other assets, including the charges of capital stock of, or other interest in the safe deposit company, trust company, corporation, bank or other institution making the delivery or transfer, and in addition thereto a penalty of one thousand dollars; and the payment of such tax and interest thereon or the penalty above prescribed or both may be enforced in an action brought by the attorney general at the relation of the director of revenue, in any court of competent jurisdiction."

There is only one situation where the provisions of Section 145.210, RSMo 1959 become inoperative. Subsection 2, Section 145.150, RSMo 1959 states that:

"The court shall immediately upon the filing of the inventory and appraisalment of the estate of a decedent, examine the same, and if it is apparent, in the opinion of the court, that the estate is not subject to the tax provided for in this law, its finding and opinion shall be entered of record in the court and thereupon the provisions of section 145.210 become inoperative as to the holders of funds or other property thereof, and there shall be no further proceedings relating to such tax unless upon the application of interested parties the existence of other property or an erroneous appraisalment is shown."

Assuming that there are no applications of interested parties claiming the existence of other property or an erroneous appraisalment:

(1) If the finding and opinion of the court that the estate is not subject to the tax are entered of record, then the requirement of notice need not be met.

(2) If no such finding and opinion of the court are entered of record, then the requirement of notice must be met.

CONCLUSION

If, after the filing of the inventory and appraisement of the estate of the decedent, it is the opinion of the court entered of record that these items are not taxable, then and only then do the provisions of Section 145.210, RSMo become inoperative.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas E. Eichhorst.

Yours very truly,

Thomas F. Eagleton
THOMAS F. EAGLETON
Attorney General

GASOLINE TAX:
STATUTORY CONSTRUCTION:

Motor fuel tax claims for refund which had not been filed with the Collector of Revenue within 120 days next preceding October 13, 1963, had legally expired and were not revived when Section 142.230, RSMo Cum. Supp. 1963 was amended extending the period of filing such claims from 120 days to one year.

March 16, 1964

Opinion No. 77



Honorable Paul E. Williams
State Representative
Bowling Green, Missouri

Dear Mr. Williams:

This is in answer to your letter dated January 20, 1964, in which you ask the following question:

"A constituent has asked me a question relative to gasoline tickets for refund that were more than 120 days old before October 13, 1963, but are still within the one year period contemplated by the new statute. Can he collect the refund for non-highway use on these tickets? Please advise."

The Missouri motor vehicle fuel tax law, Chapter 142, RSMo 1959, as amended, imposes a license tax upon each gallon of motor fuel used for propelling motor vehicles upon the public highways of Missouri. Section 142.230, RSMo Cum. Supp. 1963, provides that if any person shall buy and use motor fuel for a purpose other than the operation of a motor vehicle upon our highways and shall have paid the license tax, then this person is entitled to a refund of the tax paid. It is not necessary, for the purposes of this opinion, to quote the refund statute, Section 142.230, supra, other than to state that this section grants the right to such a refund only under certain specified conditions.

Honorable Paul E. Williams

Prior to 1963, one of the conditions precedent to this refund was that applications for refunds were required to be filed with the Collector of Revenue within 120 days from the date of purchase of the motor fuel. As you well know, the 72nd General Assembly amended this time period by enlarging it from 120 days to one year, Senate Bill No. 24, Laws 1963.

As stated in your letter, the amendment of Section 142.230 became effective on October 13, 1963. The question now being asked by you is whether this amendment has a retrospective application so as to revive any refund claims which had expired prior to 120 days preceding October 13, 1963. The answer to this question is "no".

Statutes will not generally be given a retrospective construction unless that intent is manifest on the face of the statute. State ex rel. Breshears v. Missouri State Unemployment Retirement System, Mo. Sup., 362 SW2d 571 (1962). As stated in State ex rel. Clay Equipment Corp. v. Jensen, Mo. Sup., 363 SW2d 666 (1963) at l.c. 670:

"Further, as a general rule, statutes are construed to operate prospectively unless the legislative intent that they be given retrospective or retroactive operation clearly appears from the express language of the acts, or by necessary or unavoidable implication. [citing cases]"


CONCLUSION

Motor fuel tax claims for refund which had not been filed with the Collector of Revenue within 120 days next preceding October 13, 1963, had legally expired and were not revived when Section 142.230, RSMo Cum. Supp. 1963 was amended extending the period of filing such claims from 120 days to one year.

Honorable Paul E. Williams

The foregoing opinion, which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Very truly yours,


THOMAS F. EAGLETON
Attorney General



January 23, 1964

Honorable Brunson Hollingsworth
Prosecuting Attorney of Jefferson County
Jefferson County Courthouse
Hillsboro, Missouri

Dear Mr. Hollingsworth:

You have inquired as to whether a so-called "scratch-out" ballot must be used in voting on establishment of a County Library District under Chapter 182, Revised Statutes of Missouri 1959, or if a so-called "X" marked ballot may be used.

Section 182.010, Revised Statutes of Missouri 1959, provides in part as follows:

" * * * 2. Every voter within the proposed county library district, in his proper district may vote

'For establishing--county library district', or

'Against establishing--county library district', and may vote

'For--mills tax for a free county library', or

'Against--mills tax for a free county library.'

Honorable Brunson Hollingsworth

From an examination of Chapter 182, it will be noted that there is no language that specifies whether the so-called "scratch-out" form of ballot or the "X mark" form of ballot is required to be used. Nor is there any language pertinent to this subject except that above quoted. The main purpose of the election is to ascertain the voters' sentiment on this subject. It should never be to confuse the voters or becloud the issues.

It is the view of this office that the statute does not require a "scratch-out" ballot, in fact, it is far more in harmony with the intent of the statute to use the "X mark" ballot.

We suggest the following form:

JEFFERSON COUNTY LIBRARY

DISTRICT BALLOT



For establishing a Jefferson
County Library District



Against establishing a Jefferson
County Library District



For _____ Mills Tax for a Free
County Library



Against _____ Mills Tax for a
Free County Library

Yours very truly,

THOMAS F. EAGLETON
Attorney General

COUNTY CLERK:
DEPUTY COUNTY CLERK:
JOHNSON GRASS:

A deputy county clerk may accept additional employment from the County Weed Control Board and receive compensation for his services. This compensation is separate from and is not to be considered subject to the limitations imposed by Section 51.450, RSMo relating to the compensation of deputy county clerks.

Opinion No. 80

March 9, 1964

Bill D. Burlison, Esq.
Prosecuting Attorney
Cape Girardeau County
708 Broadway
Cape Girardeau, Missouri 63701



Dear Sir:

This is in answer to your request for an opinion, January 27, 1964, which we quote:

"This county has come under the Johnson Grass Control Law. For the purpose of handling some administrative details, the county weed control board is desirous of hiring a deputy county clerk of this county for such purpose. At present, said deputy clerk is receiving less than the maximum as set out in Section 51.450, Missouri Revised Statutes - 1959. However, the salary from the weed control board will put her above the maximum.

"The question is whether the remuneration received through administration of the Johnson Grass Control Law (263.255 to 263.267 inclusive) is applicable to Section 51.450."

In 1959, Section 263.265, RSMo was amended and now reads as follows:

"The county court, township board and special road district of any county declared a Johnson grass extermination area, in addition to any and all taxing powers which it may possess shall be authorized to levy upon all property subject to its authority a tax in an amount not to exceed five cents on each one hundred dollars assessed valuation, for the purpose of paying the expenses of the county weed control board or the agent of the board in

Bill D. Burlison, Esq.

making the inspection required under the provisions of section 263.259, and for the expense of controlling and eradicating Johnson grass on county roads and right of ways, provided that not more than twenty-five per cent of the taxes so levied and collected shall be used for administrative purposes. The cost of control and eradication of Johnson grass on all lands and highways owned or supervised by the state highway department shall be paid by the highway department out of funds appropriated for its use." (Emphasis supplied)

In addition, the Commissioner of Agriculture, as provided for in §263.259(4), RSMo, has issued rules and regulations for carrying out the provisions and requirements of the Johnson grass control law. Rule II(2) places upon the Weed Control Board the duty to "[s]elect such personnel as deemed necessary to expedite the county weed control program."

This program is under a county Weed Control Board, as authorized by Section 263.257, RSMo 1959.

A deputy county clerk acting in that capacity is under the supervision and control of the county clerk. The county clerk, in fact, sets the salary of the deputy county clerk. Here, however, the employees of the Weed Control Board are chosen and directed by the Board. It is to be noted that there is no limitation on the selection by the Board; also, that there is no specific person charged with serving the Board.

There is no statute especially prohibiting a county clerk (or deputy) from contracting with or from receiving compensation from the county in addition to his regular compensation for any work performed by him in addition to his official duties. Of course, if there are any additional duties of the office of county clerk that must be performed in connection with the Johnson grass control law, no additional compensation can be allowed for their performance.

The general rule of law is stated in 67 C.J.S., Officers §88, as follows:

"Where the duties of an officer are increased by the addition of other duties germane to the office without provision for compensation, the officer must perform such duties without extra compensation. So, an officer is not

Bill D. Burlison, Esq.

entitled to extra compensation because additional duties pertaining to the office have been assumed by him or imposed on him by the exigencies of the office. Services required of officers by law for which they are not specifically paid must be considered compensated by the fees allowed for other services.

"On the other hand, an officer is not obliged, because his office is salaried, to perform all manner of public service without additional compensation, and for services performed by request, not part of the duties of his office, and which could have been as appropriately performed by any other person, he may recover a proper remuneration. In this connection, although service not required by the law cannot be classed as official duties, nevertheless public policy requires that courts should not favor nice distinctions in order to declare certain acts of public officers extraofficial.

"Extra services, as applied to services of officers, are services incident to their offices for which compensation is not provided by law."

A copy of an official opinion rendered February 12, 1959, to John S. Williamson is attached. This opinion discusses rather exhaustively the right of county officials to receive compensation for work done for the county outside of their official duties.

It would appear that a county clerk or deputy county clerk is not prohibited from receiving compensation from the county for additional services performed by him, provided the services he performs are not within his official duties. Administering the Johnson Grass Control Law is not within the duties of the county clerk.

CONCLUSION

It is our opinion that a deputy county clerk may accept additional employment from the County Weed Control Board and receive compensation for his services. This compensation is separate from and is not to be considered subject to the limitations imposed by Section 51.450, RSMo, relating to the compensation of deputy county clerks.

Bill D. Burlison, Esq.

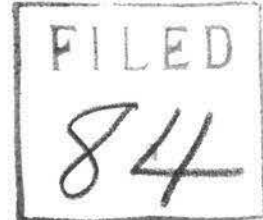
The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas E. Eichhorst.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

Enclosure

February 4, 1964



Honorable M. E. Morris
Director
Department of Revenue
P. O. Box 200
Jefferson City, Missouri 65102

Re: Opinion No. 84

Dear Mr. Morris:

Answering your opinion request dated January 30, 1964,
asking:

"Does a Magistrate Court have authority to
grant limited driving privilege under Sec-
tion 302.309 RSMo. to a person convicted in
his court of Driving while Intoxicated for
the first time under Section 564.440 Revised
Statutes of Missouri?"

I enclose herewith Opinion No. 20, dated April 2, 1962,
to Bill Davenport, which, I believe, answers your question.

The enactment of Section 564.440(5) by the 1963 Legis-
lature does not alter my opinion that only the circuit court
has jurisdiction to grant the limited hardship driving
privilege.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:10

Enclosure

ELECTIONS: Candidates who filed for office and paid their filing
CANDIDATES: fee prior to October 13, 1963, as required by Section
FILING FEES: 120.350, RSMo 1959, need not pay an additional filing
fee as required by Section 120.350, RSMo Cum. Supp.
1963 in order to be eligible candidates.

Opinion No. 86

March 6, 1964

Honorable David Thomas
Prosecuting Attorney
Carroll County
Carrollton, Missouri



Dear Mr. Thomas:

This is in answer to your opinion request regarding an interpretation of Section 120.350, RSMo Cum. Supp. 1963. Your letter reads as follows:

"The question has arisen as to whether the provisions of 120.350 (1963) apply to persons filing for office prior to October 13, 1963 and paying the old fee of \$5.00. Two persons filed for county offices last January (1963) and paid the \$5.00 fee. Must they now pay an additional \$20.00?"

Section 120.350, RSMo Cum. Supp. 1963 reads as follows:

"1. Each candidate, except a candidate for a township office, previous to filing declaration papers, as in sections 120.300 to 120.650 prescribed, shall pay to the treasurer of the state or county central committee of the political party upon whose ticket he seeks nomination a certain sum of money, as follows:

(1) To the treasurer of the state central committee: One hundred dollars if he is a candidate for a state office, fifty dollars if he is a candidate for representative in congress, circuit judge or state senator;

(2) To the treasurer of the county central committee: Twenty-five dollars if he is a candidate for state representative or any county office.

Honorable David Thomas

"2. The candidate shall take a receipt therefor and file such receipt with his declaration papers. The sums of money so paid by the several candidates shall be evidence of their good faith in filing their declaration papers and shall be used as an expense fund by the several political parties upon whose tickets the various candidates seek nomination."

As noted in your letter, Section 120.350, enacted by the 1963 legislature, became law on October 13, 1963. The sole issue presented by you is whether this statute is retroactive in its operation. There is no language in the statute itself purporting to make it retroactive or retrospective in its operation. This being so, this statute is prospective only and cannot affect those persons who filed for office prior to October 13, 1963. As expressed by the Missouri Supreme Court in the case of Clark Estate Company v. Gentry, 362 Mo. 80, 240 SW2d 124, 129 [6], cert. denied, 72 S. Ct. 109, 342 U. S. 868:

"The rule is that, in the absence of clear legislative intent to the contrary, the effect of statutes is prospective only. (Citing cases)"

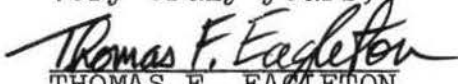
The statute in question here contains no language whatsoever indicating the legislative intent that this statute should be other than prospective in operation.

CONCLUSION

It is, therefore, the opinion of this office that those persons who filed for public office prior to October 13, 1963, and paid the filing fee required under Section 120.350, RSMo 1959, need not pay an additional filing fee required by virtue of Section 120.350, RSMo Cum. Supp. 1963 in order to be qualified candidates for public office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Robert D. Kingsland.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

Opinion No. 87
Answered by letter

July 8, 1964

Honorable M. E. Morris
Director, Department of Revenue
State of Missouri
P. O. Box 898
Jefferson City, Missouri 65102

Dear Mr. Morris:

This is in response to your recent request for an opinion of this office, which request reads as follows:

"I herewith submit request for an official opinion on the following subject: Pertaining to Compensation of County Collectors, coming within the provisions of subsection (15), of Section 52.260 Missouri Revised Statutes, enacted by the recent General Assembly as Senate Bill 259.

"Sub-section (15) of Section 52.260 reads as follows: 'In counties wherein the total amount levied for any one year exceeds four million dollars (4,000,000.00), a commission of one per cent on the amounts collected'.

"St. Charles County being a county of the third class, comes within the provisions of sub-section (15) for the tax year ending 2-29-1964, and there is a possibility of other third class counties, namely, Boone, Cape Girardeau, Franklin, Platte, Cole, Pettis and possibly others which may fall within this category sometime in the near future.

"If county collectors for the above mentioned counties were allowed to retain compensation at the rate of one per cent on the amounts collected, there would be the possibility

*Note: The letter
attached to Mr.
Morris dated July 14,
1964 is an integral
part of this letter
and is to remain
attached to it.*

Honorable M. E. Morris

of these collectors being allowed to retain enormous sums as compensation.

"Section 52.270 determines maximum amount of commissions and fees to be retained by collectors coming within the provisions of sub-sections 1 through 14 of Section 52.260, however, no provision is made for those collectors of third class counties who have at present, or may at a later date, come within the provisions of sub-section (15) of Section 52.260.

"My question is as follows:

"How may the maximum amount of compensation, (other than that provided for in paragraph 3 of Section 52.270), to be retained by a county collector of a third class county, coming within the provisions of sub-section (15) of Section 52.260, be determined?"

This problem was treated generally in an opinion of this office issued on September 4, 1963, to the Honorable Alfred A. Speer, which reads in part as follows:

"Since Subdivision (15) applies to all counties wherein the 'total amount levied for any one year exceeds four million dollars . . .', it is conceivable that it could apply to counties of the third and fourth class. Because the collectors in those counties are compensated by commissions, it is possible that Senate Bill No. 259 could cause an increase in their compensation by making the provisions as to limitations on the amount of commissions collectors are allowed to retain found in Section 52.270, 1961 Cum. Supp., inapplicable to such collectors. This section imposes limitations on the amount of commissions retainable by collectors in the classifications indicated in Subdivisions (1) through (14) of Section 52.260, but makes no reference to the collectors who come within the newly created Subdivision (15).

Honorable M. E. Morris

"However, we are not advised as to whether any counties of the third and fourth classes, by virtue of their respective tax levies, do in fact come within the provisions of Subdivision (15); and any definitive pronouncement in this area would be based solely on speculation. Suffice it to say that if Subdivision (15) did increase the amount of commissions retainable by removing certain collectors from the limitations set out in Section 52.270, supra, Section 13, Article VII of our Constitution would prevent such collectors from receiving compensation in excess of the presently established limits during their current terms of office. State ex rel. Emmons v. Farmer, (Mo. Sup. 1917) 196 SW 1106, 1109[5,6]."

When the Legislature created subdivision (15) of Section 52.260, RSMo Cum. Supp. 1963, without imposing a limitation upon the subdivision (15) collectors, it apparently did not foresee the possibility that any third or fourth class counties would subsequently fall into this classification. However, since Section 52.270, RSMo was not amended, and therefore no express limitation upon the compensation of subdivision (15) collectors has been made, the literal interpretation of the two sections, read together, is in accord with your interpretation that collectors of such counties, subject to the constitutional prohibition against increases in compensation during current terms of office, will qualify for the unduly large salaries. For example, a collector in a county wherein the total levy amounts to more than four million dollars could properly claim as his annual compensation a sum in excess of forty thousand dollars.

It is, of course, within the realm of possibility that a court could, by application of one of the accepted rules of statutory interpretation, construe the limitation on subdivision (14) salaries found in Section 52.270 as governing salaries of collectors in subdivision (15) counties, in spite of the fact such counties are not expressly mentioned therein. However, in view of the fact that the Legislature will convene before any collector can claim any of the salaries with which we are here concerned, we find it unnecessary to further explore this possibility at this time.

Honorable M. E. Morris

Unquestionably, the most effective way of avoiding the distinct possibility that some county collectors will be paid in excess of \$40,000 per year is by legislation which may impose an express limitation upon compensation of collectors in counties referred to in subdivision (15) of Section 52.260, RSMo Cum. Supp. 1963.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

Enclosures

1t

July 14, 1964

Honorable M. E. Morris
Director, Department of Revenue
State of Missouri
P. O. Box 898
Jefferson City, Missouri 65102

ATTENTION: W. T. Scott

Dear Mr. Morris:

This is in response to the request received from your office for clarification of our recently issued Opinion No. 87 dated July 8, 1964. You have asked specifically whether the collector of St. Charles County may, under the facts set out in the request for that opinion, presently qualify for the compensation provided by subdivision (15) of Section 52.260, RSMo Cum. Supp. 1963. We further understand that the levy in St. Charles County now exceeds four million dollars per year.

We are of the opinion that the collector in question is not entitled to the benefits conferred by subdivision (15) of Section 52.260, supra, for the reason that this would amount to an increase in compensation during his present term of office as prohibited by Section 13, Article VII, Mo. Const. 1945. It is correct that a county officer may properly, during the same term of office, advance to different brackets within a formula established by statute if that formula is the one which was in effect at the time he commenced his current term. State ex rel. Moss v. Hamilton, 303 Mo. 302, 260 SW 466; State ex rel. Harvey v. Linville, 318 Mo. 698, 300 SW 1066. However, the case at hand presents a slightly different problem.

At the time the county collector in question commenced his current term of office (March 1963), there was no subdivision (15), Section 52.260, RSMo Cum. Supp. 1963, in effect. Subdivision (15) was added by the 72nd General Assembly to the then existing Section 52.260, and became effective on October 13, 1963.

July 14, 1964

Consequently, since this portion of the formula set out by Section 52.260 was not in effect at the time this collector commenced his current term, he may receive no benefits from it and will retain as compensation only that amount provided for by subdivision (14) of Section 52.260, as limited by Section 52.270.

As discussed in Opinion No. 303 dated September 4, 1963, the fact that the limitations imposed as described above on this collector remain in effect does not affect the amount which the collector retains since the constitutional prohibition upon increases of his compensation does not affect the other provisions of the law. A copy of the opinion last referred to is attached herewith.

In brief, the collector of St. Charles County, as to his personal compensation, is still governed by the formula set out in subdivision (14) of Section 52.260, RSMo 1959, and limited as provided by subparagraph 2 of Section 52.270, RSMo Cum. Supp. 1961, the latter of which provides in part:

" . . . and out of the residue of commissions in his hands after deducting the amounts so allowed, the collector may retain a compensation for his services at the rate of ten thousand dollars per year. If the residue of commissions is less than sufficient to pay the above compensation, the entire residue shall be allowed to him as full payment for his services. If the residue is more than sufficient to pay the compensation, the surplus shall be paid over to the state, school, county and city in the proportion which the amount collected from each bears to the total amount of collections."

Very truly yours,

THOMAS F. EAGLETON
Attorney General

Attachment
AJS:lt

ACCREDITATION: Capitol Business College is not "an acc-
BUSINESS COLLEGES: redited university, college or conserva-
COLLEGES: tory" within the meaning of Section 431.067,
CONTRACTS: RSMo Cum. Supp. 1963; hence, a minor cannot
INSURANCE: execute a legally binding note or notes
MINORS: for his education at that institution.

May 22, 1964

Opinion No. 88

Honorable Thomas D. Graham
Speaker
House of Representatives
Capitol Building
Jefferson City, Missouri



Dear Sir:

This is in answer to a request for an opinion of this office of February 4, 1964, which refers to Senate Bill No. 58 of the 72nd General Assembly and which letter reads in part as follows:

"In your opinion, would a business college such as Capitol Business College here in Jefferson City, come under the definition of college under this bill, so that a minor might execute a legally binding promissory note or notes for his education at that institution?

"Capitol Business College is accredited as a two-year school of business by the Accrediting Commission for Business Schools, which is recognized by the U. S. Commissioner of Education as the national accrediting agency in the business school field. Only one other business college in Missouri has qualified for this accreditation. One of the numerous requirements for accreditation is that the educational program be reasonably one of post-secondary level. The texts used at Capitol Business College are college texts and graduation from high school or its equivalent is required for admission."

Section 1 of Senate Bill No. 58 of the 72nd General Assembly now is Section 431.067, RSMo Cum. Supp. 1963, which provides as follows:

"Any minor may execute legally binding promissory notes and may legally contract to borrow money to defray the necessary expenses of attending any accredited university, college or conservatory, and shall have full legal capacity to act in his own behalf for the purpose, and shall have all the rights, powers and privileges and be subject to the obligations of persons of full age with respect to the contracts and notes."

This statute allows minors to execute legally binding promissory notes and to legally contract to borrow money to continue their education at an accredited university, college or conservatory. But for this provision, all such contracts are voidable by the minor.

The Accrediting Commission for Business Schools is recognized by the United States Commissioner of Education as a national accrediting agency in the business school field. A communication from Mr. R. Orin Cornett, Acting Assistant Commissioner for Higher Education of the Office of Education in the Department of Health, Education, and Welfare, Washington, D. C., does not disclose that any other association is so recognized by the Commissioner. It was held in *Louisiana Board of Pharmacy v. Smith*, La. App., 65 S.2d 654, 658, that the term "accredited school" meant "a school placed on an accredited or approved list by some national rating group or association." Thus, in order for a business school to be considered as a "university, college or conservatory", for the purposes of Section 431.067, RSMo Cum. Supp. 1963, it must be so accredited as a "university, college or conservatory" by the Accrediting Commission for Business Schools, or a similar recognized accrediting agency.

The 1963 - 1964 Official Directory of Accredited Institutions and Operating Criteria of the Accrediting Commission for Business Schools provides for the classification of institutions into four distinct types: a one-year business school, a two-year business school, a junior college of business, and a specialized college of business. Different specifications and requirements are established for each of these four types of institutions. Capitol Business College is accredited as a two-year school of business (page 14 of the Official Directory). This type of institution is defined as follows:

"A two-year business school is a post-high school institution which offers at least one program of instruction two school years in length, the objectives of which are measured primarily in terms of vocational competence, and completion of a course is determined to a large degree through the measurement of skill attainment. It may not consist of a combination of two one-year programs unless one is prerequisite to the other." (Page 35 of the Official Directory)

The above definition of a two-year school of business is contrasted with the following definition of a two-year school on a collegiate basis:

"A junior college of business is a Two-Year collegiate school devoted exclusively or substantially to business education at the college level, or a separately administered department or division of business education within an institution having other objectives. In either case its educational objectives should be to provide specialized instruction sufficient to insure adequate preparation for an appropriate semi-professional career. Thus the curriculum should be primarily devoted to business education. However, this requirement is to be evaluated in a manner which will encourage the inclusion of subjects having values of general education, when they contribute to breadth and balance of any course of study." (pages 36 - 37 of the Official Directory)

The contrast is further heightened by the definition that:

"A Specialized College of Business is a four-year collegiate institution devoted exclusively or substantially to professional business education at the college level. This is interpreted as referring also to separately administered departments, divisions, or schools within specialized institutions also having other objectives. The institution shall be legally authorized by

the appropriate state agency to confer baccalaureate degrees. A baccalaureate degree shall require the completion of a minimum of 120 standard semester hours normally acquired and earned over a period of 8 semesters of 15 to 19 weeks of instruction each, or 180 quarter or term hours normally earned over a period of 12 quarters or terms of ten to twelve weeks of instruction each. A standard quarter-, semester-, or term-hour normally requires an average of three class hours of work in class, laboratory, and/or study each week for a semester, quarter, or term. Thus, a three-hour course would necessitate an average of nine hours of work per week. These nine hours may be divided between class lectures and discussions, laboratory, and individual study to suit the particular course for which credit is allowed. Normally, an hour refers to a net of 50 minutes of class time with additional time allowed for changing classes." (pages 43 - 44 of the Official Directory)

In accordance with the foregoing standards and definitions of the Accrediting Commission for Business Schools, Capitol Business College is accredited as a "two-year school of business". The Capitol Business College is not accredited as a "junior college of business" nor as a "specialized college of business".

Section 431.067, RSMo Cum. Supp. 1963, was enacted to enable minor students to make a legally binding contract to borrow money for their education at an "accredited university, college or conservatory". The original bill authorized notes and contracts "to defray the expenses of attending any recognized institution of higher education". On perfection, the words "recognized institution of higher education" were deleted and the following language inserted: "accredited university, college or conservatory".

The words "any recognized institution of higher education" used in the original bill are rather vague, indefinite, and uncertain as to the type, kind, and character of institution the bill intended to affect. Consequently, in order to be more specific, the words "accredited university, college or conservatory"

were substituted. However, this does not indicate a legislative intent to change the type and character of institution affected. The legislative intent, in our view, still indicates that the purpose is to limit the application of the act to institutions of higher education at the college or university level.

Also, this language indicates institutions which are primarily academic - teaching arts, sciences, music, and the professions. The act, as indicated by the language used, does not indicate it intended to include within its scope institutions which are devoted to instruction of a vocational nature.

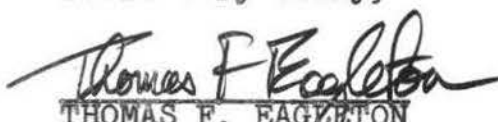
hours

Conclusion

It is the opinion of this office that Capitol Business College is not an "accredited university, college or conservatory" within the meaning of Section 431.067, RSMo Cum. Supp. 1963; hence, a minor cannot execute a legally binding note or notes for his education at that institution.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas E. Eichhorst.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

LINCOLN UNIVERSITY: The State Treasurer should not transfer the
STATE TREASURER: balance in the Lincoln University Fund to
the General Revenue Fund.

Opinion No. 93

March 11, 1964



Honorable Milton Carpenter
Treasurer of the State of Missouri
State Capitol
Jefferson City, Missouri

Dear Mr. Carpenter:

This is in answer to a request for an opinion of this office
of February 10, 1964, which reads as follows:

"Should the State Treasurer transfer the balance
in the Lincoln University Fund to the General
Revenue Fund in accordance with Missouri Statute
33.080."

Section 33.080, RSMo 1959:

"All fees, funds and moneys from whatsoever
source received by any department, board,
bureau, commission, institution, official
or agency of the state government by virtue
of any law or rule or regulation made in
accordance with any law, shall, by the
official authorized to receive same, and at
stated intervals of not more than thirty
days be placed in the state treasury to
the credit of the particular purpose or
fund for which collected, and shall be
subject to appropriation by the general
assembly for the particular purpose or
fund for which collected during the biennium
in which collected and appropriated. The
unexpended balance remaining in all such
funds (except such unexpended balance as
may remain in any fund authorized, collected
and expended by virtue of the provisions
of the constitution of this state), shall
at the end of the biennium and after all
warrants on same have been discharged and
the appropriation thereof has lapsed, be
transferred and placed to the credit of
the ordinary revenue fund of the state by

Honorable Milton Carpenter

the state treasurer. Any official or other person who shall willfully fail to comply with any of the provisions of this section, and any person who shall willfully violate any provision hereof, shall be deemed guilty of a misdemeanor; provided, that all such money received by the curators of the University of Missouri except those funds required by law or by instrument granting the same to be paid into the seminary fund of the state, is excepted herefrom, and in the case of other state educational institutions there is excepted herefrom, gifts or trust funds from whatever source; appropriations; gifts or grants from the federal government, private organizations and individuals; funds for or from student activities; farm or housing activities; and other funds from which the whole or some part thereof may be liable to be repaid to the person contributing the same, and hospital fees. All of the above excepted funds shall be reported in detail quarterly to the governor and biennially to the general assembly." (Emphasis added)

Section 175.040, RSMo 1959:

"It is hereby provided that the board of curators of the Lincoln University shall organize after the manner of the board of curators of the state University of Missouri; and it is further provided, that the powers, authority, responsibilities, privileges, immunities, liabilities and compensation of the board of curators of the Lincoln University shall be the same as those prescribed by statute for the board of curators of the state University of Missouri, except as stated in this chapter."

From the above, it would appear to be plain that it was the intent of the framers of Section 175.040 that the board of curators of Lincoln University should be in precisely the same situation as the board of curators of the University of Missouri. It seems clear that the intention of the General Assembly was that all statutory provisions with respect to the curators of the

University of Missouri would automatically apply to the curators of Lincoln University unless otherwise provided in Chapter 175, RSMo.

The words of Section 175.040 "except as stated in this chapter." are an interpretative aid; and, in this respect, we direct attention to 50 Am. Jr. §220, which reads:

"* * * where a rule of construction is contained in the statute itself, that rule should be applied if it is necessary to use any rules of construction in determining the meaning of the law."

We find no provision in Chapter 175 RSMo making the exception in Section 33.080 inapplicable to Lincoln University. Therefore, such exception in Section 33.080 applicable to the University of Missouri applies also to Lincoln University.

CONCLUSION

Therefore, it is our opinion that the State Treasurer should not transfer the balance in the Lincoln University Fund to the General Revenue Fund.

The foregoing opinion which I hereby approve, was prepared by my assistant, Thomas E. Eichhorst.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

INSURANCE: Articles of Incorporation of Republic States
Life Insurance Company

OPINION NO. 95



February 12, 1964

Honorable Ralph H. Duggins, Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

Receipt is acknowledged of your letter of February 10, 1964, with which you submitted to this office an executed copy of Articles of Incorporation, including a Declaration of Intention of original incorporators, of the proposed Republic States Life Insurance Company. Also forwarded with your request for an opinion concerning the documents heretofore referred to was proof of publication of the same as required by Section 376.070 RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Sections 376.010 to 376.670 RSMo 1959, as amended, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

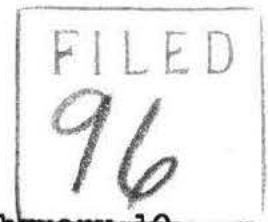
THOMAS F. EAGLETON
Attorney General

Vagrancy: A man may be prosecuted under Section 563.340,
Misdemeanor: 1959, relating to vagrancy, for his willful
Nonsupport: neglect or refusal to support his family, even
Criminal Law: though he is divorced at the time prosecution
is initiated, if such willful neglect or
refusal is alleged to have taken place prior
to said divorce.

March 11, 1964

Honorable William H. Knox
Assistant Prosecuting Attorney
City of St. Louis
Municipal Courts Building
14th and Market Streets
St. Louis, Missouri

OPINION NO. 96



Dear Mr. Knox:

This is in reply to your opinion request of February 10, 1964, in which you ask:

"Please advise this office as to what effect, if any, a divorce would have on the clause which states, 'and every able bodied married man who shall neglect or refuse to provide for the support of his family.' Since the divorce the parties are not married anymore.

"Does the statute apply under these circumstances?"

Section 563.340, RSMo 1959, states in part as follows:

"* * * every able-bodied married man who shall neglect or refuse to provide for the support of his family, * * * shall be deemed a vagrant, and, upon conviction thereof, shall be punished by imprisonment in the county jail not less than twenty days, or by fine not less than twenty dollars, or by both such fine and imprisonment."

This is a criminal statute. Such statutes defining crimes are required to be construed liberally in favor of the defendant and strictly against the state. State v. Katz Drug Company, Mo., 352 S.W. 2d 678, 682 [3]. Furthermore, in the construction of a statute, the primary purpose

is to ascertain the legislative intent. That intent should be found, if possible, from the wording of such statute. A criminal statute does not include persons other than those which are clearly described in the statute. *State v. Hall*, Mo., 351 S.W. 2d 460, 463 [2,3].

The language used by the Legislature in that portion of Section 563.340, RSMo 1959, with which this opinion is concerned clearly designates that the Legislature intended to restrict its application to a man who was able bodied and married.

In *State v. Padberg*, Mo.App., 115 S.W. 2d 72, 74 [3], the St. Louis Court of Appeals declared that the provisions of this statute were leveled "against the able-bodied married man, who, having the ability to do so, either neglects or refuses to furnish the support mentioned. That is the vagabond husband; . . ." (emphasis ours).

Unquestionably a man who is divorced does not fall within the category of a husband, and, therefore, is not within the class of persons this statute is leveled against. The man's classification, however, is to be determined as of the time the willful neglect or refusal to support his family took place, and not as of the time prosecution therefor is initiated. *Hall v. State*, Ala., 14 So. 867.

CONCLUSION

A man may be prosecuted under Section 563.340, RSMo 1959, relating to vagrancy, for his willful neglect or refusal to support his family, even though he is divorced at the time prosecution is initiated, if such willful neglect or refusal is alleged to have taken place prior to said divorce.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

March 4, 1964



Honorable Maurice Schechter
State Senator, 13th District
41 Country Fair Lane
Creve Coeur 41, Missouri

Dear Senator Schechter:

This is in response to your request for an opinion dated February 11, 1964. Your request reads as follows:

"One of the fourth class cities in St. Louis County elects its Marshall-Collector each two years and by ordinance pays him a salary of \$575.00 per month.

"The Board of Aldermen of such city has recently passed an ordinance whereby the salary of the Marshall-Collector shall be increased progressively and such ordinance is as follows:

"Starting salary	-	\$527.00 per month
After 12 months service	-	\$553.00 per month
After 24 months service	-	\$581.00 per month
After 36 months service	-	\$610.00 per month
After 48 months service	-	\$641.00 per month
After 66 months service	-	\$673.00 per month.

"Involved herein is whether the progressive increase in salaries is in violation of the constitutional prohibition increasing salaries during the term of office of an elected official without giving him increased duties.

"May I please have your opinion respecting the validity of such an ordinance."

As we understand the facts submitted in your letter, the city officer in question has been elected for a two-year term and an ordinance was passed prior to the beginning of this two-year term, fixing his salary at \$575 per month. You further indicate that recently the city, by ordinance, has provided

Honorable Maurice Schechter

for a progressive increase in salary based on length of service. It is our understanding that you desire to know whether these progressive increases can be made effective during the current two-year term of the officer involved.

We believe that both the statutes and the State Constitution prohibit an increase of this type. Section 79.270, RSMo 1959, which is applicable to fourth class cities provides as follows:

"The board of aldermen shall have power to fix the compensation of all the officers and employees of the city, by ordinance. But the salary of an officer shall not be changed during the time for which he was elected or appointed."
(Emphasis supplied)

Article VII, Section 13 of Missouri's Constitution reads as follows:

"The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

It appears that the ordinance which you describe, as applied to an officer already elected for a current term, would be in violation of the above provisions. Our office issued official opinion No. 172 on May 24, 1963, to the Honorable John L. Fitzgerald, Member, Missouri House of Representatives. This opinion involved similar facts and we are enclosing a copy of it for your convenience.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

Enc.
CB:df

BANKS
STATE FUNDS
STATE TREASURER

March 5, 1964

Opinion No. 99 Answered by Letter
(Eichhorst)

Honorable Milton Carpenter
State Treasurer
State Capitol
Jefferson City, Missouri



Dear Mr. Carpenter:

This is in answer to the following question:

"If a Missouri Bank has \$10,000.00 Federal Deposit Insurance Corporation Coverage should they be requested to post additional collateral to secure State funds in a Time Deposit - Open Account in the amount of \$10,000.00."

Section 30.270, RSMo 1959 requires security for state deposits "of an amount equal at least to one hundred and ten per cent of the aggregate amount on" deposit, "less the amount, if any, which is an insured deposit" under FDIC. On a deposit of \$10,000.00, you would subtract the maximum FDIC amount which is also \$10,000.00, leaving nothing on which the 110% requirement would apply.

In fact, in 1957, Senate Bill 29 (Laws, 1957, p. 484, §1) removed the five thousand dollar limit, the previous amount of maximum FDIC insured deposits, and inserted general language which would allow the present maximum amount of FDIC insured deposits to be subtracted from the amount upon which the 110% security requirement would operate.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

TEE:hm

Opinion telephone request
answered by letter
(Siddens)

Opinion No. 100

February 13, 1964

Honorable J. E. Schellhorn
Representative - Second District
Buchanan County
2610 Penn Street
St. Joseph, Missouri



Dear Mr. Schellhorn:

With reference to your telephone conversation with Gordon Siddens, Assistant Attorney General, on February 12, 1964, concerning the validity of candidate filings for the 1964 Primary Election in Buchanan County, we understand the following to be the facts.

The treasurer of the Buchanan County Democratic Committee died in December 1963. The County Committee did not meet to elect a new treasurer until February 1964. In the meantime, several persons filed candidacies in Buchanan County and paid filing fees to the Buchanan County Committee, and obtained receipts therefor from the secretary of the County Committee who acted as treasurer without official authority to so act. Your question is whether or not these filings and these receipts signed by the secretary of the County Committee are valid.

This question is governed by Section 120.350, Revised Statutes of Missouri 1959, as amended, 1963 Cumulative Supplement. We enclose herewith a copy of an opinion issued by this office dated June 4, 1954, to C. D. Hamilton. In addition to the case of State ex rel. Haller vs. Arnold, 277 Mo. 474, 210 SW 374, 375, cited in the above opinion, there are other more recent cases which follow the same principles. State ex rel. Neu vs. Waechter, 332 Mo. 574, 58 SW2d 971; State ex rel. Preisler vs. Woodward, 340 Mo. 906, 105 SW2d 912; and State ex rel. Dodd vs. Dye, Mo. App., 163 SW2d 1055.



Honorable J. E. Schellhorn

-2-

February 13, 1964

The essential fact is that the filing fee has in fact been paid within the proper time to the County Committee. The issuance of the receipt and the form thereof is not of vital importance. In my opinion, the receipts issued by the secretary acting as treasurer, even though without official authority of the Committee, are valid for the purposes of compliance with Section 120.350. Since there is plenty of time to do so before the filing deadline, it would be permissible for the County Committee treasurer to now issue appropriate receipts showing the payment of the fees and now filing the same with the county clerk.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:10:hm

March 19, 1964



Honorable Frank M. Karsten
Member, United States House
of Representatives
Washington, D. C.

Dear Mr. Karsten:

This is in response to your letter of January 20, 1964, inquiring as to the amount which may be legally expended by a candidate for the United States Congress from the First Congressional District in the August 1964 primary election as well as the November 1964 general election.

Such matters are provided for generally in Chapter 129, RSMo 1959, and specifically in Section 129.100 which reads as follows:

"No candidate for congress or for any public office in this state, or in any county, district or municipality thereof, which office is to be filled by popular election, shall by himself or by or through any agent or agents, committee or organization, or any person or persons whatsoever, in the aggregate pay out or expend, or promise or agree or offer to pay, contribute or expend any money or other valuable thing in order to secure or aid in securing his nomination or election, or the nomination or election of any other person or persons, to any office to be voted for at the same election, or in aid of any party or measure, in excess of the sum of eight dollars for each one hundred voters. The

Honorable Frank M. Karsten

number of voters shall be ascertained by the total number of votes cast for all the candidates for president in the state, or in any county, district or municipality thereof, at the last preceding regular election held to fill the same. Any payment, contribution or expenditure, or promise, agreement or offer to pay, contribute or expend any money or other valuable thing in excess of said sum, for such objects or purposes, is hereby declared unlawful. For the purpose of this section, a primary election and the following general election shall be considered separate elections."

Examination of Section 128.212, Cum. Supp. 1963 reveals that the First Congressional District is now composed of the wards in the City of St. Louis and the townships in St. Louis County which are listed below. The Boards of Election Commissioners of the city and county provided the figures which appear below. The figures to the right of the named political subdivision represent the votes cast in each such area in the 1960 presidential election with the letter "K" reflecting the number of votes cast for John F. Kennedy and "N" reflecting the number of votes cast for Richard M. Nixon:

COUNTY

Florissant Township	(K)	17,989
	(N)	9,322
St. Ferdinand Township	(K)	21,728
	(N)	10,475
Normandy Township	(K)	10,805
	(N)	6,617
Washington Township	(K)	5,282
	(N)	2,782

CITY

Ward 1	(K)	8,429
	(N)	4,902

Honorable Frank M. Karsten

CITY (continued)

Ward 2	(K)	5,918
	(N)	2,515
Ward 3	(K)	6,051
	(N)	1,997
Ward 4	(K)	9,071
	(N)	1,911
Ward 5	(K)	7,230
	(N)	1,142
Ward 19	(K)	6,557
	(N)	1,017
Ward 20	(K)	8,491
	(N)	2,493
Ward 21	(K)	6,763
	(N)	3,087
Ward 22	(K)	8,500
	(N)	1,825
Ward 27	(K)	7,914
	(N)	4,059
TOTAL		184,872

We are aware of the fact that, after the 1960 presidential election (although prior to the general election of 1962), the boundaries of the First Congressional District were changed. However, we believe that a fair reading of Section 129.100, supra, requires that it be applied, where there has been a boundary change, by determining the total votes cast in the last presidential election in the area that now comprises the district and subjecting this figure to the workings of the formula prescribed in Section 129.100.

Honorable Frank M. Karsten

Therefore, on the basis of the figure set out above, it appears that the maximum expenditure, under Missouri law, that can be made by a candidate for election to the United States House of Representatives from the First Congressional District would be \$14,789.76. This amount was determined by dividing the total number of votes cast in the area that now comprises the First Congressional District in the 1960 presidential election by one hundred and multiplying the quotient by eight dollars, i. e., $\frac{184,872}{100} \times \$8.00 = \$14,789.76$.

As you will note from the final sentence of Section 129.100, the primary and the following general election are regarded as separate elections. Therefore, insofar as state law is concerned, the maximum expenditure in each election will be the figure set out above.

Turning to applicable federal statutes, however, we find a considerably smaller amount permitted. Section 248, Title 2, USCA, reads as follows:

"(a) A candidate, in his campaign for election, shall not make expenditures in excess of the amount which he may lawfully make under the laws of the State in which he is a candidate, nor in excess of the amount which he may lawfully make under the provisions of this title.

"(b) Unless the laws of his State prescribe a less amount as the maximum limit of campaign expenditures, a candidate may make expenditures up to--

"(1) The sum of \$10,000 if a candidate for Senator, or the sum of \$2,500 if a candidate for Representative, Delegate, or Resident Commissioner; or

"(2) An amount equal to the amount obtained by multiplying three cents by the total number of votes cast at the last general election for all candidates for the office which the candidate seeks, but in no event exceeding \$25,000 if a candidate for Senator or \$5,000 if a candidate for Representative, Delegate, or Resident Commissioner.

Honorable Frank M. Karsten

"(c) Money expended by a candidate to meet and discharge any assessment, fee or charge made or levied upon candidates by the laws of the State in which he resides, or expended for his necessary personal, traveling, or subsistence expenses, or for stationery, postage, writing, or printing (other than for use on billboards or in newspapers), for distributing letters, circulars, or posters, or for telegraph or telephone service, shall not be included in determining whether his expenditures have exceeded the sum fixed by paragraph (1) or (2) of subdivision (b) as the limit of campaign expenses of a candidate."

According to the 1963-1964 Roster published by the Missouri Secretary of State, the total vote in the 1962 general election for Representative from the First Congressional District was 116,305 (82,216 you received plus 34,089 received by your opponent). By applying the formula prescribed by subsection (b) (2) of Section 248, supra, to this figure, we arrive at the amount of \$3,489.15 as the maximum expenditure in the forthcoming campaign.

It should be noted, however, that subsection (c) of the statute in question specifically excludes many items, the cost of which might otherwise be regarded as campaign expenditures. Furthermore, subsection (a) of Section 241, which defines terms employed in subsequent sections including Section 248, provides that "The term 'election' includes a general or special election, but does not include a primary election or convention of a political party; . . ." Hence, the limitations imposed by Section 248 would not apply in the coming primary election.

Therefore, in the primary election, only the law of this state will apply which, as discussed above, limits expenditures to \$14,789.76. In the general election, however, the federal statutes will operate to limit expenditures other than those excluded by Section 248 to \$3,489.15. And, of course, the limitation imposed by Section 129.100, RSMo 1959, will still apply to general election expenditures though it would not ordinarily be operable unless large expenditures are made in the categories excluded by Section 248, Title 2, USCA.

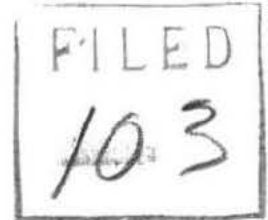
Honorable Frank M. Karsten

We sincerely hope that the foregoing will be of assistance to you.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:lt:lo



February 28, 1964

Honorable Kennard L. Fenton
Assistant Prosecuting Attorney
St. Charles County
First National Bank Building
St. Charles, Missouri

Dear Mr. Fenton:

In your letter of February 13, 1964, you inquire as to whether the clerk in the county magistrate court can use a legible "rubber stamp" to make entries in a record book instead of the present time-consuming method of typing in these entries.

We believe that either of the methods which you inquire about are appropriate if they result in a permanent and legible record entry.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

CB:df

February 18, 1964

Honorable Herman G. Kidd
Representative, Randolph County
Route No. 1
Jacksonville, Missouri



Dear Mr. Kidd:

This is in reply to your inquiry concerning the tax status of Community Memorial Hospital in Moberly, Missouri.

You indicate that the hospital is a domestic corporation organized under the Not-for-Profit corporate act of Missouri. This office issued an opinion dated February 12, 1959, holding that this corporation's charter and by-laws were consistent with its being a tax-exempt organization.

You further indicate that pursuant to the provisions of Section 137.270, RSMo 1959, the county court of Randolph County did correct erroneous assessments of the property of the said hospital for the years 1958, 1959, 1960, 1961, and 1962, by reducing the assessments to zero and striking from the collector's accounts the delinquent taxes, upon the ground that the said hospital was in fact a charitable organization using its property for charitable purposes, under Section 137.100, RSMo 1959, and Article X, Section 6, Constitution of Missouri. This office, in an opinion issued on June 12, 1963, ruled that the county court had jurisdiction to correct taxes extended against exempt property.

You inquire as to whether Section 94.050, RSMo 1959, precludes the city from correcting its previous assessments for these same years and thereby making them conform to the assessment records previously corrected by the Randolph County Court. Section 94.050 provides as follows:

"The city council shall have no power to relieve any person from the payment of any tax, or exempt any person from any burden imposed by law."

Honorable Herman G. Kidd

We believe that this section has no application to the problem here involved. It simply prohibits any action on the part of the city council which would relieve any person from paying any lawful tax or burden imposed by law. If, in the present instance, the hospital was erroneously assessed, then of course such erroneous assessment would not constitute a lawful tax or a burden imposed by law.

We have read the other statutory sections cited in your inquiry and we believe that the law can be summarized as follows: The county court has authority to hear and determine allegations of erroneous assessment at any term of the court before the taxes are paid, on appropriate application therefor. If the municipal corporation in the county involved has likewise levied or attempted to levy an erroneous assessment, the city council has the power and authority to correct the erroneous assessments.

We hope that the above discussion will be helpful in resolving the questions here involved.

Very truly yours,

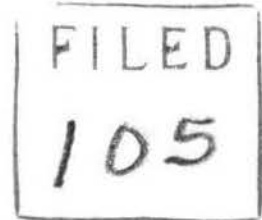
THOMAS F. EAGLETON
Attorney General

CB:df

COUNTY CLERK: (1) County engineer of a third class county is not
COUNTY COURT: authorized to purchase material and incur expenses
COUNTY HIGHWAY on behalf of county in absence of order of record
ENGINEER: by county court; (2) New county highway engineer
COUNTY WARRANTS: has no authority to approve unauthorized expenditures
HIGHWAY ENGINEER: incurred by former county highway engineer and the
PRESIDING JUDGE: county court may not ratify and pay such bills;
PURCHASES: (3) Presiding judge of the county court is not
WARRANTS: required to sign warrants for expenses incurred by
unauthorized county officer; (4) County warrant not
signed by presiding judge of county court cannot be lawfully issued;
(5) Without order of record, county clerk may not issue and presiding
judge is not authorized to sign county warrant.

Opinion No. 105

October 14, 1964



Honorable Rolin T. Boulware
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Mr. Boulware:

Your recent request for an opinion of this office involves questions concerning the County Highway Engineer and the County Court of Shelby County. Shelby County is a county of the third class. From the information you gave this office in your letter and in a subsequent telephone conversation, the situation appears to be as set out in the following paragraphs.

The then Shelby County Highway Engineer prior to December 31, 1963, incurred certain expenses totalling \$740.19 for county highway purposes which were charged to the county. The purchases were for motor fuel, minor repairs on equipment and smaller items of expense. In the past the county court had paid such similar expenses without an order of record authorizing the county highway engineer to incur such expenses.

The County Court has now refused to pay the expenses incurred and also refused to pay similar expenses for 1964 totalling \$768.13 incurred by the present County Highway Engineer appointed on January 1, 1964. The former County Highway Engineer has refused to approve the bills by signing them. The new County Highway Engineer approved both the bills he incurred and the former engineer's bills by signing them.

The County Road Fund was then and is now sufficient to pay for these expenses. However, the Presiding Judge of the County Court has refused to sign the county warrants to pay the bills as he believes the expenses were not properly authorized.

Coming to your first question, you ask:

Honorable Rolin T. Boulware

"Does the County Highway Engineer have authority, in the absence of a County Court order made of record, to purchase materials and incur expenses and charge same to the County Court, assuming, of course, that the materials he orders are for legitimate county purposes?"

While the highway engineer of a third class county under Section 61.220 RSMo is authorized to supervise expenditures of county and district funds by county road overseers and the county court must have the engineer's approval before it pays such expenditures, such statute does not authorize the county highway engineer to make such expenditures himself. Nor can we find any other statutory authority for a county highway engineer of a third class county to make expenditures for motor fuel, minor repairs on equipment or other small items of expense. See also enclosed opinion to Honorable John E. Brooks, under date of June 10, 1947.

We note that the county court did not authorize the highway engineer to make these purchases by an order of record. Assuming it might be held that there was implied authority in the engineer to make such purchases based on the prior actions of the county court in paying for similar purchases by the engineer in the past such course of conduct does not obligate the county. A county court speaks only through its record. For the engineer to have authority to bind the county, it is necessary that there be an order of record authorizing him to make such purchases. *Missouri-Kansas Chemical Co. v. Christian County*, 352 Mo. 1087, 180 SW2d 735; *Boatright v. Saline County*, 350 Mo. 945, 169 SW2d 371; *State v. Miller*, Mo. App., 297 SW2d 611. See also Section 431.090 RSMo, which provides as follows:

"The county court may, by an order entered of record, appoint an agent to make any contract on behalf of such county for erecting any county buildings, or for any other purpose authorized by law; and the contract of such agent, duly executed on behalf of such county, shall bind such county if pursuant to law and such order of court."

Therefore, the answer to your first question is that the county highway engineer of a third class county is not authorized to purchase materials and incur expenses on behalf of the county in the absence of a county court order of record.

Honorable Rolin T. Boulware

Your second question reads as follows:

"Does the new County Highway Engineer have authority to approve bills incurred by the old Highway Engineer, and if not what can be done by the Court concerning the unapproved bills presented for payment incurred in December, 1963, when the old County Engineer was in office?"

In view of the fact that the former county highway engineer had no authority to make the expenditures for the county, approval of the bills either by the present highway engineer or the former county highway engineer would have no effect one way or the other on the liability of the county for these claims. Only if the county court has the power to ratify the agreements made by the county highway engineer with the supplier without authority could the county be liable.

This brings us to the question as to what the county court can do concerning the unapproved bills incurred by the former county highway engineer in 1963.

Section 432.070 RSMo provides:

"No county, city, town, village, school, township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

Section 431.100 RSMo permits quantum meruit recovery against a county on contracts with a county that does not fulfill the requirements as to form as provided by Section 432.070 RSMo.

Inasmuch as the contracts entered into by the county highway engineer for supplies and repairs were unauthorized, the county is not bound. Nor is the county bound in quantum meruit under Section 431.100 RSMo because it is necessary under this statute that the agent be lawfully authorized. *Carter v.*

Honorable Rolin T. Boulware

Reynolds County, 315 Mo. 1233, 288 SW 48; State v. Miller, Mo. App., 297 SW2d 611; Elkins-Swyers Office Equipment Co. v. Moniteau County, 357 Mo. 448, 209 SW2d 127.

Nor may the county court at this time ratify such unauthorized contracts and pay the claimants. The county court is in a position of public trust with respect to the public funds and it may not expend such funds to satisfy a claim for which the county is not liable. Carter v. Reynolds County, supra; Missouri-Kansas Chemical Co. v. Christian County, supra; State v. Miller, supra; Elkins-Swyers Office Equipment Co. v. Moniteau County, supra.

Therefore, your question as to what the county court may do with regard to such unauthorized bills is answered in the negative in that the county court may not ratify the contracts and pay the bills.

Your third question reads as follows:

"Does the Presiding Judge have to sign county warrants for expenses incurred and charged to the County by the Highway Engineer when no prior authority to incur same has been entered by order of record by the County Court?"

This question is answered by State v. Miller, supra, which held at 297 SW2d 615, that the presiding judge is not required to sign warrants for expenses incurred by an unauthorized officer since his duty to sign was not clear and plain, and mandamus would not lie to compel him to sign.

Your fourth question reads as follows:

"If two of the County Judges vote to pay County bills so presented and the Presiding Judge votes against payment and thereafter the Presiding Judge refuses to sign the warrants, can the remaining two County Judges voting for payment, issue and sign the county warrants?"

Section 50.190 RSMo clearly directs that warrants "shall be signed by the president of the court". There is no statutory provision for signatures by other judges of the court if the president refuses. It was held in Steffen v. Long, 165 Mo. App. 254, 147 SW 191, that a warrant without the signature of the presiding judge cannot be lawfully issued.

Honorable Rolin T. Boulware

Therefore, it is our opinion that a county warrant signed by the county judges other than the president cannot be lawfully issued.

Your fifth question reads as follows:

"Do the Presiding Judge and the County Clerk have a right to issue and sign a warrant where the minutes of the County Clerk do not show any order by the County Court authorizing the payment of the bill?"

It is necessary for the issuance of a warrant by the clerk to be based on an order by the county court under Section 50.180 RSMo and as pointed out previously in this opinion, a county court acts only through its record. Therefore, in order for the clerk to issue a warrant for the presiding judge to sign, it is necessary that the record of the county court show that the county court authorized the payment of the bill by an order made of record.

Conclusion

Therefore, it is the opinion of this office that: (1) The county engineer of a third class county is not authorized to purchase material and incur expenses on behalf of the county in the absence of an order of record by the county court; (2) A new county highway engineer has no authority to approve unauthorized expenditures incurred by a former county highway engineer and the county court may not ratify and pay such bills; (3) The presiding judge of the county court is not required to sign warrants for expenses incurred by an unauthorized county officer; (4) A county warrant not signed by the presiding judge of the county court cannot be lawfully issued; (5) Without an order of record, the county clerk may not issue and the presiding judge is not authorized to sign a county warrant.

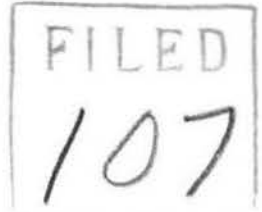
The foregoing opinion, which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

Enclosure

February 25, 1964



Mr. Austin Hill
Deputy Secretary of State
Jefferson City, Missouri

Dear Mr. Hill:

This is in answer to your letter of recent date in which you pose two questions regarding County Library District Elections. The first question is when a petition is presented under Section 182.010, RSMo, for the formation of a County Library District and the county in which such petition is presented has one or more cities in such county which at the time provide free public and tax-supported libraries can the residents of such cities vote in the election for establishment of the County Library District.

Section 182.010 provides that whenever electors equal to five per cent of the total vote cast for Governor at the last election in a county outside of cities maintaining free public and tax-supported libraries present a petition to the county court asking that a County Library District of the county outside the limits of such cities be established, the county court is to call an election on such question and shall order that the question "be submitted to the voters of the proposed County Library District."

Such section provides further that in case the boundary limits of a city maintaining a free tax-supported library are not the same as the boundary limits of the school district of such city that the voters residing in the school district, but outside the limits of the city or town and within the limits

Page Two
Mr. Austin Hill
February 25, 1964

of the proposed County Library District shall be eligible to vote. It is clear that under the provisions of Section 182.010 only the persons living outside the limits of cities maintaining free tax-supported libraries are eligible to vote for the establishment of a County Library District in a county containing such cities. We are not, of course, ruling on the situation that exists where a city wishes to vote under provisions of Section 182.030, RSMo, on the establishment of a County Library District, including such city.

Your second question is whether the voters in such county outside of such cities must be registered in order to vote at the election for the establishment of the County Library District, if such county has adopted local option registration under provisions of Chapter 114, RSMo, as amended. Section 114.240, RSMo. Cum. Supp. 1963, provides that Chapter 114 shall not be construed to include elections other than state and county, general, special and primary elections, and city elections in cities of over 400,000. Obviously, when a county library district is to be established in those parts of the county outside the limits of cities with tax-supported libraries, there is no county election. The election is one for the establishment of a County Library District and is in no way a county election. This would be true even if there were no cities or towns in such county maintaining tax-supported libraries since the election is one in the territory comprising a County Library District and is not a county election.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

Opinion No. 108
Answered by Letter

February 28, 1964



Honorable David Thomas
Prosecuting Attorney
Carroll County
Carrollton, Missouri

Dear Mr. Thomas:

In your letter of February 19, 1964, you inquire as to whether the township assessor has a vote when sitting as a member of the county board of equalization.

Section 138.010, RSMo 1959, expressly provides that the township assessor is a member of said board when the assessment of his township is under consideration or review. We believe that this provision makes him a member of the board for all intents and purposes, if his township is involved, and under these circumstances he would be authorized to vote in the same manner as any other member of the board provided for by the statutes.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

CB:df

TUITION:
SCHOOLS:
HIGH SCHOOL TUITION:
SCHOOL DISTRICTS:

The term "debt service" as used in Section 161.095, RSMo 1963 Supp., refers only to the indebtedness of the high school attended and the indebtedness of other schools is not included within this term.

April 28, 1964

Opinion No. 109

Honorable Rube Schapeler
Representative
Bates County
Butler, Missouri



Dear Representative Schapeler:

This opinion is issued in response to your request of February 21, 1964, for an official opinion of this office. You inquire:

"I have a reorganized elementary school District R9, in my county confronted with the following problem. They send their High School students to Appleton City School district. Appleton City School Board officials are charging them tuition under the revised law 161.095. Appleton City is interpreting the law to allow them to include as debt service bonded debt on their elementary school building as well as the bonded debt on their High School.

"I would appreciate it greatly if you would give me an opinion on this at your earliest convenience."

Section 161.095, RSMo 1963 Supp., provides:

"161.095. District to pay tuition of non-resident high school pupils - - 'debt service' defined.

1. The board of directors of each school district in this state that does not maintain an approved high school offering work through the twelfth grade shall pay the tuition of each pupil resident therein who has completed the work of the highest grade offered in the schools of the district and who attends an approved high school in another district of the same or an adjoining county, or an approved high school maintained in connection with one of the state institutions of higher learning, where work of one or more higher grades is offered.

"2. The rate of tuition shall not exceed the per pupil cost of maintaining the high school attended, less a deduction of the additional amount of state aid granted to the district maintaining the high school, as provided in subsection 3 of section 161.031. The cost of maintaining the high school attended shall be determined by the board of education of the district but in no case shall it exceed all amounts spent for teachers' wages, incidental purposes, debt service, maintenance and replacements. The term 'debt service' as used in this section means expenditures for the retirement of bonded indebtedness and expenditures for interest on bonded indebtedness. Per pupil cost of the school attended shall be determined by dividing the cost of maintaining the high school by the average daily high school pupil attendance. The amount of tuition to be paid by the district of the pupil's residence shall likewise be determined on the basis of average daily attendance of pupils attending a high school outside the district. If there is disagreement as to the amount of tuition to be paid, the facts shall be submitted to the state board of education, and its decision in the matter shall be final. Subject to the limitations of this section, each pupil shall be free to attend the school of his or her choice; but no school shall be required to admit any pupil." (Emphasis added)

(We note parenthetically that the number, Section 161.095 will be changed to Section 167.131 by the codification of school laws under Senate Bill No. 3 of the 72nd General Assembly to take effect July 1, 1965).

We understand your inquiry to be: Does the term, "debt service", in Section 161.095 include indebtedness on all schools of the district receiving the high school students or only the indebtedness on the high school attended?

Subsection (2) of Section 161.095 limits the rate of tuition for students attending high school in another district. This maximum tuition rate is determined by dividing the "cost of maintaining the high school by the average daily high school pupil attendance," less additional state aid under Section 161.031 (3). The cost of maintaining the high school attended is not to exceed the total spent for "teacher's wages, incidental purposes, debt service, maintenance and replacements."

April 28, 1964


Several times in Section 161.095 it is stated that the maximum tuition rate is calculated upon "the cost of maintaining the high school attended". "Debt service" is one of the items used in calculating the "cost of maintaining the high school". Obviously the term "debt service" refers to the indebtedness of the high school only.

CONCLUSION

Therefore, it is the opinion of this office that the term "debt service" as used in Section 161.095, RSMo 1963 Supp., refers only to the indebtedness of the high school attended and the indebtedness of other schools is not included within this term.

The foregoing opinion which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

March 2, 1964



Honorable Joe R. Ellis
Prosecuting Attorney
Barry County
Cassville, Missouri

Dear Mr. Ellis:

Your recent letter referred to a requirement by the Barry County Court for the juvenile officer to submit an itemized statement showing dates, cases and trips in which mileage was incurred in the performance of official duties before reimbursing him for mileage expense. You asked if the county court could make such a requirement.

Section 211.391, RSMo., provides for expenses for the juvenile officer in second, third and fourth class counties as follows:

"2. Actual expenses, including a mileage allowance not to exceed that amount allowed state officers for each mile traveled on official business but exclusive of office expense, incurred by the juvenile officer and deputy juvenile officers while in the performance of their official duties shall be reimbursed to them out of the funds of the county or counties."

It is to be noted that the mileage allowance is for each mile traveled on official business while in the performance of their official duties.

Mileage expenses are not given to the officer as a matter of course. He must indicate in some manner that he is entitled to such reimbursement for miles traveled on official business.

Honorable Joe R. Ellis

In State v. Wehmeyer, 113 SW2d 1031, 1033, the court held that there is no right to mandamus against the county court to compel payment of a claim for compensation unless the claim be clear and free from doubt. The county court has the power and duty of auditing and settling all demands against the county and is called upon to exercise a discretion which is vested in it for the purpose of enabling it to protect the county from unjust or incorrect claims.

Therefore, it is not unreasonable for the court to require an officer to be specific as to dates, cases and trips on which such miles were traveled so that the county court may be assured that such were traveled on official business.

I hope that the above satisfactorily answers your question and if I may be of further assistance do not hesitate to call on me.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

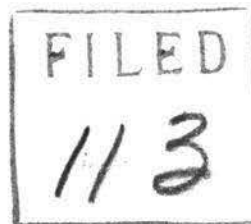
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COMPENSATION: Limitation on the amount a clerk of a
COUNTY CLERK: third class county may pay for deputy
DEPUTY CLERK: hire in Section 51.450 RSMo does not
DEPUTY REGISTRATION CLERK: apply to limit the amount he may pay
REGISTRATION OFFICER: a deputy registration clerk appointed
SALARY: under Section 116.030 RSMo. Such
deputy registration clerk may be
assigned duties in the nature of those
ordinarily performed by a deputy clerk.

OPINION NO. 113

July 7, 1964

Honorable Frank Conley
Prosecuting Attorney
Boone County
Columbia, Missouri



Dear Mr. Conley:

Your request for an opinion of this office has reference to the appointment of a deputy registration clerk by the county clerk of a third class county under authority of Section 116.030 RSMo.

Your first question concerning such appointment may be restated as follows:

1. Does the limitation on the amount a clerk of a third class county may pay for deputy hire in Section 51.450, RSMo., apply to limit the amount he may pay a deputy registration clerk appointed under Section 116.030 RSMo?

It is observed that the maximum amount the County Clerk of Boone County may pay for deputy hire under Section 51.450 RSMo is Six Thousand Dollars (\$6,000.00) annually, which is computed as follows:

Section 51.450, RSMo: "1. The clerk of the county court in each county of the third class is entitled to employ deputies and assistants, and for the deputies and assistants, is allowed the following sums:

* * * * *

(6) In counties having a population of thirty thousand or more, the sum of one hundred and twenty-five per cent of the salary of the county clerk; but the total allowance for deputies and assistants shall in no case exceed the sum of four thousand dollars annually. [The four thousand dollar limit applies in Boone County.]

"2. The county court in all counties of the third class may allow the county clerk, in

Honorable Frank Conley

addition to the amount herein specified for deputies or assistants' hire, a further sum not to exceed one thousand dollars per annum, to be used solely for clerical hire or allowed and paid, in whole or in part, as additional compensation to any regular deputy or assistant to be determined by the county court of the county; but the county court shall determine that the work required to be done by the clerks demands or requires the extra remuneration.

"3. In addition to salaries fixed by this section the deputy county clerk shall receive one thousand dollars a year payable out of the county treasury."

Thus, Section 51.450 RSMo authorizes the county clerk to employ deputies and to pay them a total of not to exceed Six Thousand Dollars (\$6,000.00), which may be divided among the deputies as he sees fit.

Chapter 116, RSMo, imposes on the county clerk the duty of registration officer in counties not having voter registration containing a city of 10,000 inhabitants. This applies to Boone County.

Section 116.030 RSMo refers to the appointment of deputies, providing in pertinent part:

" . . . The said county clerk and his deputies shall have the power to administer oaths and perform all other duties necessary to carry out the provisions of this chapter. The county clerk may appoint not more than two additional deputies who shall be in addition to those regularly employed in his office, to perform such necessary duties and other duties as may be assigned to them by the county clerk, and whose salaries shall be fixed by the county court. Before they shall enter upon their duties, the county clerk shall submit the names of the one or more deputies to the judges of the circuit court sitting in any such county, who shall approve the appointment of any such deputies before they shall enter upon the performance of their duties. . . ."

Honorable Frank Conley

Inasmuch as the statute authorizes the clerk to appoint "additional deputies" and "who shall be in addition to those regularly employed", it is clear that such deputies are not the same creatures as the deputies employed under Section 51.450 RSMo but rather such deputies employed under Section 51.450 RSMo are the "regularly employed" deputies referred to in Section 116.030 RSMo, supra.

It, therefore, follows that the limitations imposed by Section 51.450 RSMo on the amount to be spent for deputy hire does not apply to the "additional deputies" appointed by the county clerk under Section 116.030 RSMo. The salaries of such "additional deputies" are provided in Section 116.030 RSMo, which are to be fixed by the county court.

Your second question may be restated as follows:

2. Could such deputy registration clerk be assigned duties in the nature of those ordinarily performed by a deputy clerk?

The "additional deputies" under Section 116.030 RSMo are "to perform such necessary duties. . . ." "Such necessary duties" obviously refers to the preceding sentence wherein the powers and duties of the clerk and his deputies are set out as follows: ". . . the power to administer oaths and perform all other duties necessary to carry out the provisions of this chapter." Therefore, the additional registration deputy is given the power to administer oaths and perform all other duties necessary to carry out the provisions of Chapter 116, RSMo.

In addition to performing necessary duties, additional registration deputies are "to perform such . . . other duties as may be assigned to them by the county clerk."

"Other duties as may be assigned to them by the clerk", given its natural meaning means that the additional registration deputy may be given duties to perform other than those necessary to carry out the provisions of Chapter 116, RSMo.

Since there are no specific statutory qualifications required or duties imposed upon regularly employed deputies provided for in Section 51.450 RSMo, the "additional deputies" provided for in Section 116.030 RSMo may perform duties ordinarily performed by the regularly employed deputy clerk.

Honorable Frank Conley

CONCLUSION

Therefore, it is the opinion of this office that the limitation on the amount a clerk of a third class county may pay for deputy hire in Section 51.450 RSMo does not apply to limit the amount he may pay a deputy registration clerk appointed under Section 116.030 RSMo. Such deputy registration clerk may be assigned duties in the nature of those ordinarily performed by a deputy clerk.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

FOR OPINION 114 (1964)
ANSWERED BY LETTER--C. B. Burns,
Jr.

March 3, 1964



Honorable Daniel V. O'Brien
Prosecuting Attorney
St. Louis County
Court House
Clayton, Missouri 63105

Dear Mr. O'Brien:

This is in answer to your letter of recent date regarding the City of Vinita Park and inquiring whether the ordinance of such city setting a salary for chief of police separate from that of the elected marshal of such city is a valid ordinance.

Reference is made to the opinion of this office rendered under date of May 24, 1963, to John L. Fitzgerald, a copy of which opinion we are enclosing. We believe that such opinion largely rules the question regarding Vinita Park. We call your attention to the provision of Section 71.010, which provides that all municipal corporations in this state having authority to pass ordinances upon which there is a general law of the state, unless otherwise prescribed or authorized by some special provision of its charter, shall pass such ordinances only as are in conformity with the state law upon the same subject.

It is our view that where there is an elected city marshal in a city of the fourth class that he is by virtue of such office the chief of police of such city as is held in the opinion of May 24, 1963, and that there cannot be a separate office of chief of police in such city. The opinion of May 24, 1963, held that the marshal of such city elected in 1963 could not receive

Page Two
Honorable Daniel V. O'Brien

during his term of office an increase in salary as chief of police of such city because of the provision of the Constitution and the statutes that the compensation of no officer should be increased during his term of office. Such opinion held that the single office of marshal and chief of police was involved, and, therefore, any increase in salary would have to be for the officer occupying both offices.

Therefore, we rule that the marshal of a fourth class city is the chief of police by virtue of holding the office of marshal, and that the salary fixed as marshal is the only salary that can be paid to such officer. In view of this ruling it is our view that the ordinances of Vinita Park, authorizing a separate compensation for the chief of police, are invalid.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CBB/fh

CRIMINAL LAW:
CRIMINAL PROCEDURE:
FELONIES:
INFORMATIONS:
TRIAL:
SEPARATE CRIMES:
WAIVER:

A defendant may not properly be charged and convicted at the same trial of two distinct felonies (except as authorized by statute) unless he waives this procedure by not objecting during trial or after trial.

Opinion No. 116

March 27, 1964

Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Mr. Burrell:

This is in reply to your opinion request in which you ask:

"One man, by the name of, was in the County Jail awaiting trial on the charge of armed robbery; while he was awaiting trial on this charge he took the stand in defense of a man who was with him on the armed robbery and committed perjury. The charge of perjury was then filed against but no warrant was served pending disposition of the armed robbery charge. Now in the attempted escape stabbed his jailor in the throat and I have filed a charge of Felonious Assault against him. Is there any way under the law existing in Missouri where I could charge this man with all three of these crimes and try him on all three of these crimes at the same time?"

The answer to this inquiry is found in the case of State v. Terry, Mo., 325 S.W. 2d 1, in which the defendant was convicted of the two separate felonies of burglary in the first degree and forcible rape, which were pleaded in the same information under separate counts. The jury, pursuant to the trial court's instructions, returned two separate guilty verdicts and assessed defendant's punishment at five years in the penitentiary in each verdict. Neither the information nor the procedure was questioned by defendant's counsel at trial or after trial.

In reaching this decision the court pointed out that although the joinder of separate felonies does not render an indictment or information bad as a matter of law, a defendant may not properly be convicted at the same trial of two separate felonies except where provided for by statute. The court stated, l.c. 4:

Honorable Don E. Burrell

"* * * It is the law that the joinder of distinct felonies does not render the indictment or information in which they are joined bad as a matter of law. State v. Gholson, Mo., 292 S.W. 27, 28 [2-5]. * * *

"* * * The established rule in this state is that a defendant may not properly be convicted at the same trial of two distinct felonies except in those instances specifically provided for by statute. RSMo 1949 § 560.110, V.A.M.S. See also 42 V.A.M.S. Supreme Court Rule 24.04. * * *" (citing cases)

Notwithstanding this rule, however, the court held that the defendant's conviction of two separate felonies in this particular case did not constitute error because defendant's counsel had waived any objection thereto and that such matter could be waived. In this regard the court's language was as follows, l.c. 5:

"Thus, inasmuch as there is no express prohibition against the conviction of a defendant of two distinct felonies at the same trial, and inasmuch as there appears to be no reason for the established rule in Missouri which should prevent a waiver of that rule, and inasmuch, as heretofore noted, an information or indictment in which are joined two distinct felonies is not bad as a matter of law, we are of the view that a defendant's failure to assign as error in his motion for new trial the action or inaction of the trial court which resulted in his conviction of two distinct felonies at the same trial, effects a waiver of his right to rely on the rule in question. In other words, if a defendant prefers that two distinct felonies with which he is to be charged be joined in one information, and if he prefers that he be tried on both those charges at one and the same trial, we perceive no reason why he may not so elect. We hold, therefore, that a defendant's failure to raise any question in his motion for new trial about the fact that or the procedure whereby he was convicted of two distinct felonies at the same trial and separately sentenced for each, should have the same effect as though defendant had specifically elected to be tried on both felonies at the same time."


Honorable Don E. Burrell

CONCLUSION

It is our conclusion, based upon the foregoing authority, that a defendant may not properly be charged and convicted at the same trial of two distinct felonies (except as authorized by statute) unless he waives this procedure by not objecting during trial or after trial.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,



THOMAS F. EAGLETON
Attorney General

TOWNSHIPS:
COMMITTEE:
WARDS:
TOWNSHIP COMMITTEES:

In a township which contains a city ward from which committeemen and committeewomen are elected, a resident of such city ward may not file for the position of township committeeman or committeewoman.

Opinion No. 117

March 10, 1964

Honorable Frank Conley
Prosecuting Attorney
Boone County
Columbia, Missouri



Dear Mr. Conley:

Your recent request for an opinion of this office may be restated as follows:

In a township which contains a city ward from which committeemen and committeewomen are elected, may a resident of that city ward file for the position of township committeeman or committeewoman?

In your letter you refer to the opinion of this office under date of February 14, 1952, addressed to the Honorable Robert G. Kirkland, which concluded that a committeeman and committeewoman were to be selected from Ward 21 of Kansas City and a committeeman and committeewoman were to be selected from the remainder of the township in which Ward 21 was located. This conclusion was based on Section 120.760, RSMo., which defined "election districts" as not less than a ward in cities subdivided into wards and townships in counties.

Section 120.770, RSMo., in providing the qualifications for committeemen and committeewomen states in part:

"At the August primary each voter may write in the space left on the ballot for that purpose the names of a man and a woman, qualified electors of the precinct, or voting district as the case may be, for committeemen for such township or voting district, . . . Any qualified elector in any such voting precinct or district may have his or her name printed on the primary ballot or party ticket. . . ." (Emphasis added)

From this statute it is clear that the legislature made eligible for committeemen and committeewomen only "qualified electors" of

Honorable Frank Conley


the voting district or precinct. As the Kirkland opinion indicated, the only "qualified electors" in the part of the township not included in the city ward were those who resided outside of the city ward.

CONCLUSION

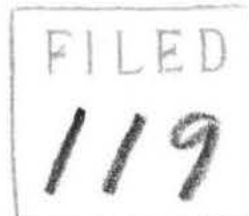
Therefore, it is the opinion of this office that in a township which contains a city ward from which committeemen and committeewomen are elected, a resident of such city ward may not file for the position of township committeeman or committeewoman.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jeremiah D. Finnegan.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

March 6, 1964



Honorable William E. Seay
Prosecuting Attorney
Dent County
Salem, Missouri

Dear Mr. Seay:

This letter is in response to your inquiry of February 27, 1964, concerning whether the trustees of the Dent County Public Health Center may deposit surplus funds in a time account in the bank.

Section 205.042, RSMo 1959, provides that:

"* * * All moneys received for the county health center shall be deposited in the county treasury to the credit of the county health center fund, * * *."

Thus, it appears to us that the county health center should deposit the money in the county treasury to the credit of the health center and then the county court may place the funds involved in an interest-bearing time deposit.

We are enclosing a copy of an opinion issued by this office on December 20, 1963 to Mr. Robert B. Mackey, Commissioner, Division of Finance, State of Missouri, which opinion, we believe, will resolve any further questions which you may have concerning this matter.

Very truly yours,

CB:df:BJ

THOMAS F. EAGLETON
Attorney General

Enclosure

LIBRARY:
LIBRARY BOARD:
CITY LIBRARY BOARD:
ST. JOSEPH LIBRARY BOARD:
PURCHASE OF BOOKS AND SUPPLIES:
CITY PURCHASING AGENT:
CITY PURCHASES:

The city library board of the City of St. Joseph is authorized by the charter and by the statutes, to make its own purchases of necessary books and supplies for the use of the library. No order or ordinance of the City of St. Joseph or its officers compelling the purchase of all supplies by the city purchasing agent, is applicable to the city library board.

March 4, 1964

OPINION NO. 120



Honorable J. E. (Jerry) Schellhorn
State Representative
Buchanan County, 2nd District
2610 Penn Street
St. Joseph, Missouri

Dear Mr. Schellhorn:

On March 2, 1964, you requested an opinion of this office in which the question asked may be stated in the following language:

Whether the City of St. Joseph or the Mayor, by administrative order, may require the city library board to comply with the order that all city purchases of supplies shall be made by the city purchasing agent.

The City of St. Joseph is now a constitutional charter city, and Section 16.6 of the charter relative to the library board, authorizes the board to appoint a qualified librarian and to adopt bylaws, rules and regulations for their own guidance and for the government of the libraries. Subparagraph (2) of said section contains the following language:

"They shall have the exclusive control of the expenditure of any moneys collected to the credit of the library fund, and of the construction of any library building and of the supervision, care and custody of the grounds, rooms or buildings constructed, leased, or set apart for that purpose.

Honorable J. E. (Jerry) Schellhorn

All moneys received for the library shall be deposited in the city treasury to the credit of the city library fund, and shall be kept separate and apart from other moneys of the City, and drawn upon by the proper officers of the city, upon the properly authenticated warrants of the library board."

In addition, subparagraph (4) of said section contains the following language:

"The library board shall, notwithstanding any provisions of this charter, be constituted and appointed and have such powers and duties as are now prescribed by the General Statutes for library boards in all cities of this State."

Significantly, subparagraph (2) above quoted, is identical to subparagraph (4) of Section 182.200, RSMo 1959, which section applies to city libraries in cities containing more than five thousand inhabitants.

Prior to the adoption of the city charter, St. Joseph was a city of the first class and the library of the City of St. Joseph was governed by Sections 182.310 to 182.400. A portion of Section 182.340 relative to the power of library boards of cities of the first class is as follows:

"* * * They shall have exclusive control of all the moneys collected to the credit of the library fund and of the construction and equipment of any library building, and the supervision, care and custody of the grounds, rooms and buildings constructed, leased or set apart for that purpose, and of the purchase of books and all supplies necessary in the conduct of a public library. * * *"

It therefore appears that the language of the charter and the language of Section 182.200, that the board "shall have the exclusive control of the expenditure of all moneys collected to the credit of the library fund" gives the library board full control of its funds. This would include the purchase of books and supplies for the library, therefore, the

Honorable J. E. (Jerry) Schellhorn

board would not be required (although it might do so if it wished) to utilize the office of purchasing agent of the City of St. Joseph for the purchase of supplies.

Since the charter gives the city library board the powers prescribed by the General Statutes for library boards in all cities (St. Joseph City Charter, Section 16.6(4)), it would appear that the language of Section 182.340, supra, is applicable wherein the board is given the power to purchase books and "all supplies necessary in the conduct of a public library." This language expressly gives the board the power to purchase needed supplies. The board therefore is not compelled to utilize the services of the city purchasing agent although, as above stated, it may do so.

This view appears to be in harmony with Section 6.3 of the St. Joseph City Charter, which establishes a Division of Purchases to be headed by the city purchasing agent, which contains the following language:

"* * * The purchasing agent, pursuant to rules and regulations adopted by ordinance, shall contract for, purchase, store and distribute all supplies, materials and equipment required by any office, department, board or other agency of the City unless otherwise provided in this charter. * * *" (Underscoring ours.)

The foregoing views are in harmony with prior opinions of this office. In an opinion dated February 18, 1947, to Melvin E. Fish, which related not to a city library but to a county library under Sections 182.010 to 182.120, this office held that a county library board had the sole right to appoint a county librarian and his assistants, and this determination could not be controlled by any state or county agency.

Also, in an opinion dated May 8, 1961, to Paxton P. Price, this office held that a city library under Sections 182.310 to 182.400 applicable to cities of the first class, could contract with the governing body of other public libraries in the state for co-operative library services, and such contract is not subject to review, approval or disapproval by the council of cities of the first class.

Honorable J. E. (Jerry) Schellhorn

CONCLUSION

The city library board of the City of St. Joseph is authorized by the charter and by the statutes, to make its own purchases of necessary books and supplies for the use of the library. No order or ordinance of the City of St. Joseph or its officers compelling the purchase of all supplies by the city purchasing agent, is applicable to the city library board.

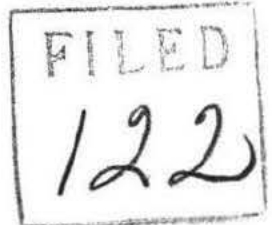
The foregoing opinion which I hereby approve, was prepared by my Assistant, J. Gordon Siddens.

Very truly yours,


THOMAS F. EAGLETON

CRIMINAL LAW:
PROSECUTING ATTORNEY:

Prosecuting Attorney has no further jurisdiction over criminal case erroneously commenced in his county, but transferred by Circuit Court to proper county in which crime was committed.



April 21, 1964

Opinion No. 122

Honorable Bill D. Burlison
Prosecuting Attorney
Cape Girardeau County
708 Broadway
Cape Girardeau, Missouri, 63701

Dear Mr. Burlison:

This is in reply to your opinion request of March 3, 1964, in which you state:

"This case was filed in the Circuit Court of Cape Girardeau County. Since the charges were filed, it has come to the attention of the Prosecuting Attorney that the crime was actually committed in the neighboring county of Bollinger. On Motion to the Cape Girardeau Circuit Court this date, the Judge ordered the cause certified and transmitted to the Circuit Court of Bollinger County pursuant to Section 541.120.

"My question is this: Does the Prosecuting Attorney of Cape Girardeau County continue to prosecute for the State in Bollinger County? Or does the Prosecuting Attorney of Bollinger County now become the prosecuting officer?"

The general venue statute for the prosecution of criminal cases is Section 541.030, RSMo 1959, which states:

"Offenses committed against the laws of this state shall be punished in the county in which the offense is committed, except as may be otherwise provided by law."

Honorable Bill D. Burlison

In view of the fact that the crime was actually committed in Bollinger County and not Cape Girardeau County, the Circuit Court of Cape Girardeau County quite properly exercised its duty under Section 541.120, RSMo 1959, by certifying and transmitting the cause to the Circuit Court of Bollinger County.

The authority of a prosecuting attorney to commence and prosecute criminal actions is set forth in Section 56.060, RSMo 1959, by the following language:

"Each prosecuting attorney shall commence and prosecute all civil and criminal actions in his county, in which the county or state is concerned, * * *. In all cases, civil and criminal, in which changes of venue are granted, he shall follow and prosecute or defend, as the case may be, all the causes, * * *."

The legislative intent regarding a prosecuting attorney's limitation in the commencement of criminal actions was spelled out by the Supreme Court of Missouri as early as 1909 in the case of *State ex rel Missouri Pac. Ry. Co. v. Williams*, 221 Mo. 227, 120 S.W. 740.

In interpreting the legislative intent under Section 4950, Revised Statutes 1899, and Amended Statutes 1906 (which is identical to 56.060, RSMo 1959), the court stated at page 749:

"* * * it was the obvious purpose to restrict the circuit attorney of St. Louis, and the various prosecuting attorneys of the counties of the state, to those matters which arise in their respective counties or city and which affect the interests of their respective local jurisdictions. It will not be seriously asserted, we think, by any lawyer, that the circuit attorney of St. Louis has authority to prosecute a crime committed outside of the corporate limits of St. Louis, and yet the duties and powers of prosecuting attorneys are conferred by the same section which limits such duties and powers to action in their respective counties."

Honorable Bill D. Burlison

Section 541.120, RSMo 1959, provides:

"When it appears at any time before verdict or judgment that the defendant is prosecuted in a county not having jurisdiction of the offense, the court may order that all the papers and proceedings be certified and transmitted to the proper court of the proper county, and recognize the defendant to appear before such court on the first day of the next term thereof, to await the action of the grand jury. The witnesses shall also be recognized to appear at such court, that the prosecution may be proceeded with as provided by law." (underlining ours)

Because the underscored language of Section 541.120 provides that the certified matter shall await the action of the grand jury, the prosecuting attorney of the proper county does not automatically assume jurisdiction of the matter by virtue of its being certified under the statute. The prosecuting attorney may, however, independently commence a prosecution in this matter by following the procedure he would follow in any other cause initially raised in his jurisdiction.

CONCLUSION

It is the opinion of this office that when, after charges have been filed in a criminal case, it is ascertained that the alleged crime was committed in another county and the cause is certified and transmitted to the proper court of the county where the crime was committed, the prosecuting attorney of the county where the prosecution was commenced has no authority to take any further action in such case.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

SALES TAX: The sale of Aldrain granules which are planted
INSECTICIDES: with corn seed is not exempt from the Missouri
sales tax.

OPINION NO. 123

June 4, 1964



Honorable Noel G. Hughes
State Representative
Dade County
Greenfield, Missouri

Dear Representative Hughes:

You recently wrote to this office requesting our opinion as to whether the sale of "Aldrain" granules is exempt from the Missouri Sales Tax Law. In your letter you make the following description of Aldrain granules:

"Aldrain granules which is made out of a very fine light red dirt which has all the moisture taken out then it is sprayed with Aldrain dried again and sacked. It is drilled at the time of planting corn exactly the same way fertilizer is put on. It kills all soil born insects there by insuring a better stand of corn."

The specific exemption which you believe applies to the sale of Aldrain granules is Section 144.030, subsection 2, RSMo 1959. The language from this subsection, which you quoted in your letter, reads as follows:

"* * * or grain to be converted into food stuffs which are to be sold ultimately in processed form at retail; or seed, lime-stone or fertilizer which is to be used for seeding, liming or fertilizing crops, which when harvested will be sold at retail or will be fed to livestock or poultry to be sold ultimately in processed form at retail, or will be converted into food-stuffs which are to be sold ultimately in processed form at retail; or spray materials

Honorable Noel G. Hughes

which are to be used for spraying growing crops, fruit trees or orchards, the crop of which when harvested will be sold at retail or will be converted into foodstuffs, which are to be sold ultimately in processed form at retail."
(Emphasis added.)

The description of Aldrain granules set forth in your letter clearly classifies this material as an insecticide and not a fertilizer. Therefore, the question is whether, as an insecticide, it can fall within the phrase "spray materials which are to be used for spraying growing crops." In your letter you specifically state that the Aldrain granules are planted in the soil along with the corn seed. Therefore, it is the opinion of this office that Aldrain granules are not spray materials used for spraying growing crops.

On the basis of the facts set forth in your letter, it is the opinion of this office that the sale of Aldrain granules at retail is not exempt under Section 144.030, supra.

CONCLUSION

The sale of Aldrain granules which are planted with corn seed is not exempt from the Missouri sales tax.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Eugene G. Bushmann.

Very truly yours,

Thomas F. Eagleton
THOMAS F. EAGLETON
Attorney General

ELECTIONS: Any question of doubt concerning the
JUDGES OF ELECTION: identity of a voter who signs the
VOTERS: comparative signature card under
COMPARATIVE SIGNATURE CARD: Section 118.475, RSMo Cum. Supp. 1963,
must be decided against the voter by
a majority of all judges of election in the precinct before he may
be denied the right to vote by reason thereof. A voter who is
denied the right to vote on such ground is entitled to vote upon
complying with the procedure set out in Section 118.490, RSMo. A
voter who willfully refuses to sign the comparative signature card
is not entitled to vote.

June 1, 1964

OPINION NO. 128

Mr. James E. Crowe, Chairman
Board of Election Commissioners
for the City of St. Louis
208 South 12th Boulevard
St. Louis, Missouri



Dear Mr. Crowe:

We have your request for our opinion relating to the construction of Section 118.475, RSMo Cum. Supp. 1963.

This statute provides for a comparative signature card in connection with elections held in the City of St. Louis and in part provides:

"The judges of elections shall require each person to write his name and address on the card so that they may compare it with the signature which appears in the precinct binder as a means of identification, and any question of doubt concerning the identity of the voter shall be decided by a majority of the judges."

In reference to the quoted portion of the statute, you ask first concerning the procedure for the judges to follow in the event that a majority of the judges do not "approve" the signature of a voter and, second, whether the procedure set forth in Section 118.490, RSMo, or some other procedure is available to a person seeking to vote who fails to receive a majority approval of his signature. These questions may be answered together.

It would appear from your questions that they refer to a situation in which the judges of election are evenly divided in their views as to whether the signature on the card was in fact

Mr. James E. Crowe

written by the same person who signed the precinct binder. It is the opinion of this office that in such a situation (an equal division of the judges of election) there is a sufficient identification of the voter to require two judges of opposite politics to initial the card of the person seeking to vote.

The general rule is well settled that election laws must be liberally construed in aid of the right of suffrage (Application of Lawrence, 353 Mo. 1028, 185 S.W.2d 818,820) and that unless the Legislature specifically provides otherwise, a statute should not be construed adverse to the right of suffrage. We note that Section 118.475 has to do only with the requirement of signing the comparative signature card and the disposition of such card thereafter. No provision is made therein as to what effect, if any, is to be attributed to a decision of the election judges either in favor of or adverse to the identity of the voter as the result of a comparison of the signatures. If there is "any question of doubt concerning the identity of the voter", after such comparison, then such question is to be decided by a majority of the judges, which would logically mean that if there is a doubt respecting the identity of the voter, a majority of the judges must concur in the doubt, rather than that a majority must affirmatively find that the signature is that of the person who signed the precinct binder. Hence, unless a majority of the judges find against the voter's identity, the doubt is resolved in favor of the voter. Once identification of the voter is established (by failure of a majority to rule adversely thereto), then two judges of opposite politics must initial the card, and it is thereafter returned to the Board of Election Commissioners with the other election returns and filed by the Board with other election material as prescribed by law.

As noted, this section contains no provision at all with respect to the effect of the decision by the election judges of the question of "doubt" other than insofar as it requires that upon "identification" two judges of opposite politics initial the card. In our opinion, the result is therefore that all other provisions of the election laws relating to the City of St. Louis remain in full force and effect. All statutes in pari materia must be read and construed together.

Section 118.500, RSMo provides that the judges shall receive the vote of no person whose name does not appear upon the precinct register as a qualified voter. Obviously, if a majority of the judges find that the person seeking to vote is not in fact the person whose name appears on the precinct register, such decision against his identity would make it the duty of the judges of election to deny such person the right to vote. However, Section

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118.490, RSMo provides a procedure whereby a person whose vote is not received by a majority of the judges may vote upon producing the required affidavits set forth in that section. The latter section deals, among other things, with the "identity of the voter" and that he is "the identical person so registered". Although the procedure under Section 118.490 is expressly made applicable to formal challenges of the voter, we do not believe that the legislative intent was to so limit its application, and hold that it may be utilized by a voter in any situation in which he is denied the right to vote on the ground that he is not the person whose name appears on the precinct register. Moreover, there can be no doubt but that a challenge would be made either by one of the election officials or a party challenger if a person sought to vote in these circumstances. Hence, if a majority of the judges doubt whether the person seeking to vote is the same person as the one whose signature appears on the precinct register and deny him the right to vote on that ground, then the procedure prescribed by Section 118.490 may be availed of by the voter. This does not mean, however, that either a decision favorable to the voter or the filing of the affidavits to permit him to vote would immunize the person seeking to vote from prosecution for impersonation of a voter, if the facts warranted such prosecution.

You ask the further question as to whether the fact that the Board of Election Commissioners has assigned six judges to a precinct under the authority of Section 121.130, RSMo would authorize all six judges to participate in the decision of the question of doubt under Section 118.475. It is the opinion of this office that all judges have an equal right to participate in the decision of any questions which are to be determined by judges of elections, including the identity of a person seeking to vote. Hence, if there are six judges of election, instead of four, in precincts which use voting machines, then the majority contemplated by both Sections 118.475 and 118.490 would be a majority of the six judges acting in the precinct in question.

The last question concerns the procedure which should be followed in the event a voter refuses to sign the comparative signature card. Section 118.475, in mandatory language, provides that the judges of election "shall require" each voter to write his name and address on the card. In the event he is unable to do so, then he is permitted to make his mark. In our judgment, if a voter willfully refuses to comply with the mandate of the statute, then he may not be permitted to vote. It is true that the statute itself contains no such provision, but we believe that it is inherent in the requirements thereof. A voter should not be authorized to render nugatory the beneficial purposes sought to be accomplished by the statute.

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In a large community such as St. Louis, election judges may not know all voters personally and therefore the Legislature provided for some other means of identification. The statute serves to promote honest elections. For such reason, it is our opinion that the requirement is mandatory and not directory, even though the statute itself does not prescribe the consequences of the refusal of a voter to write his name and address on the signature card. The general rule relating to the distinction between directory and mandatory statutes is stated in State ex rel. Ellis v. Brown, 326 Mo. 627, 33 S.W.2d 104, 107 as follows:

"There is no universal rule by which directory provisions in a statute may, in all circumstances, be distinguished from those which are mandatory. In the determination of this question, as of every other question of statutory construction, the prime object is to ascertain the legislative intention as disclosed by all the terms and provisions of the act in relation to the subject of legislation and the general object intended to be accomplished. Generally speaking, those provisions which do not relate to the essence of the thing to be done and as to which compliance is a matter of convenience rather than substance are directory, while the provisions which relate to the essence of the thing to be done, that is, to matters of substance, are mandatory."

The requirement of the signature would therefore appear to be a condition precedent to the right to demand a ballot, just as much so as the requirement that the voter register and comply with all the requirements of the registration law. As above noted, Section 118.500, RSMo specifically provides that the judges shall receive the vote of no person whose name does not appear upon the precinct register as a qualified voter. The purpose of the signature card is, in part, to implement this statute. Hence, unless and until the voter signs the comparative signature card, the judges are not required to and should not receive his vote.

Nothing herein said should be construed to affect the right of a person to vote who is, by reason of physical incapacity, unable to sign his name or make his mark, if he is otherwise properly identified as being the person whose name appears on the precinct register.

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CONCLUSION

It is the opinion of this office:

(1) That if there is any question of doubt concerning the identity of a voter who signs the comparative signature card under the provisions of Section 118.475, RSMo Cum. Supp. 1963, a majority of the judges of election must concur in the doubt, and therefore if there is an equal division of such judges, there is a sufficient identification of the voter to require the card to be initialed by two judges of opposite politics;

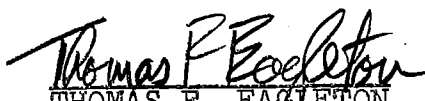
(2) That if the judges of election deny a person the right to vote upon comparing his signature on the comparative signature card with the signature on the precinct register, the procedure set forth in Section 118.490, RSMo, is available to the voter to enable him to cast his ballot;

(3) That in any precinct in which there are six election judges, all such judges have an equal right to participate in the decision of any question, and that the majority contemplated by Sections 118.475 and 118.490 would be a majority of the six judges; and

(4) That a voter who willfully refuses to sign the comparative signature card as required by Section 118.475 is not entitled to vote.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

ELECTIONS: Peace Corps Volunteers may vote absentee
BALLOTS: ballots even though not registered.
ABSENTEE BALLOTS:
VOTING:
REGISTRATION:
PEACE CORPS:

OPINION NO. 129

April 1, 1964

Honorable Harry Leitz
Director of Elections
Board of Election Commissioners
for the City of St. Louis
208 South Twelfth Boulevard
St. Louis, Missouri



Dear Mr. Leitz:

In your letter of March 11, 1964, you request a clarification on the status of Peace Corps members, who request War Ballots and who are not registered voters.

More specifically, you state that you have been receiving requests from Peace Corps members in foreign countries for War Ballots. These are not registered voters and they are sending in Form 76, issued by the United States government for servicemen and civilian employees of the government who are allowed to vote War Ballots.

The Act creating the Peace Corps is contained in Public Law 87-293, September 22, 1961, Title I. Section 5 of the Peace Corps Volunteers Law, subparagraph (h), as amended in Public Law 88-200, 77 Statute 359, Section 2(e), states that volunteers of the Peace Corps are considered employees of the United States Government for the purposes of the Federal Voting Assistance Act, and reads as follows:

"TITLE I--THE PEACE CORPS

* * * *

"Peace Corps Volunteers

"Sec. 5 * * * (h) Volunteers shall
be deemed employees of the United

Honorable Harry Leitz

States Government for the purposes of the Federal Tort Claims Act and any other Federal tort liability statute, the Federal Voting Assistance Act of 1955 (5 U.S.C. 2171 et seq.) * * *

The Federal Voting Assistance Act, Sections 2171-2196, Chapter 28, Title 5, U.S.C.A., recommends that the several states permit civilian employees of the United States, serving outside the territorial limits, and their spouses and dependents to vote by absentee ballot if they are otherwise eligible to vote in certain elections.

Section 112.300, RSMo 1959, includes civilian employees of the United States government outside the continental limits of the United States and their spouses. Section 112.300 is as follows:

"112.300. Who may vote absentee war ballot

"1. Any person being a duly qualified elector of the state of Missouri who is absent, or who expects to be absent, from the state or from the county in which he is a qualified elector, on military or naval service and who may, on the day of holding of a special, primary or general election at which any presidential preference is indicated, or any candidates are chosen or elected for any congressional, state, district, county, town, city, village, precinct or judicial offices, or at which any question of public policy is submitted, be absent from his voting precinct because of duties requiring him to be absent from the state or from the county in which he is a qualified elector, on the day of such election, may vote an absentee ballot as herein provided.

"2. The wife of any elector authorized to vote under the provisions of sections 112.300 to 112.410, when residing with her husband, may vote an absentee ballot as herein provided.

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"3. Any member of the merchant marine of the United States, any member of a religious or welfare organization assisting service men, a civilian employee of the United States government outside the continental limits of the United States, and the spouse of either of those listed herein, when residing with her husband outside the continental limits of the United States may vote an absentee ballot as herein provided in the event they are otherwise qualified to vote in the state of Missouri. Reenacted Laws 1951, p. 836, § 1, as amended Laws 1959, H.B. No. 170, § 1."

Paragraph 3 of Section 112.300 specifies that "a civilian employee of the United States government outside the continental limits of the United States, and the spouse" may vote an absentee ballot.

Section 112.310, RSMo 1959, states that any authorized elector may vote a war ballot without having complied with the registration laws.

Section 112.320, RSMo 1959, states that an elector may apply for an absentee War Ballot by a post card as provided for under the Federal Voting Assistance Act.

Under authority of the Peace Corps Act, Public Law 87-293, September 22, 1961, Title I, as amended, Peace Corps members are considered employees of the United States government for the purposes of the Federal Voting Assistance Act, Section 2171-2196, Chapter 28, Title V, U.S.C.A. Under Missouri Revised Statutes of 1959, Section 112.300-410, a Federal employee of the United States government outside the continental limits of the United States and his spouse, even though not previously registered, may apply for absentee War Ballots on post card Form 76 as provided for under the Federal Voting Assistance Act, and may cast said ballots in the county or city where they formerly resided at any special, primary or general election at which any presidential preference is indicated, or any candidates are chosen or elected for any congressional, state, district, county, town, city, village, precinct

Honorable Harry Leitz

or judicial offices, or at which any question of public policy is submitted (Section 112.300, RSMo 1959).

CONCLUSION

Therefore, it is the opinion of this office that Peace Corps members are considered Federal employees and may apply for absentee War Ballots on post card, Form 76, as provided for in the Federal Voting Assistance Act, and cast said ballots in any special, primary or general election at which any presidential preference is indicated, or any candidates are chosen or elected for any congressional, state, district, county, town, city, village, precinct or judicial offices, or at which any question of public policy is submitted, in the county or city where they formerly resided, even if they had not previously registered.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

**PLANNING COMMISSION:
ATTORNEYS RIGHT TO EMPLOY:
PROSECUTING ATTORNEYS:**

Planning Commission may not employ legal counsel. The prosecuting attorney must act for Planning Commission.

OPINION NO. 131

June 26, 1964

Honorable Brunson Hollingsworth
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Mr. Hollingsworth:

We have your request of March 10, 1964, for an opinion as to whether or not a planning commission in a county of the second class may employ legal counsel or must the prosecuting attorney act for the commission.

Your letter states:

"The Jefferson County Court has requested that I secure your Opinion with respect to the interpretation of R.S.Mo. 56.070 and 64.540.

"Query. May a Planning Commission in a County of the Second Class, under 64.540, employ legal counsel for a fee or must the Prosecuting Attorney, under 56.070, act as legal counsel for the Commission?

"This request for an Opinion arises out of the fact that the Jefferson County Planning Commission, in legal existence for the past year, has in its employ a professional resident Planning Director who has now submitted to the Jefferson County Planning Commission, a set of proposed subdivision regulations, also one proposed interim zoning regulation. Legal counsel should, of course, at this time review these proposals.

"According to our Planning Commission, planning and zoning law is in the nature of a specialty. Professor Daniel R. Mandelker,

Honorable Brunson Hollingsworth

Washington University Law Faculty, an authority on the law and technique of planning, has advised the Jefferson County Commission it is virtually imperative the Commission have legal counsel specializing in planning law."

Section 56.070, states that the prosecuting attorney shall represent generally the county in all matters of law and shall advise the county court in counties where there is no county counselor. Section 56.070, RSMo 1959, is as follows:

"The prosecuting attorney shall represent generally the county in all matters of law, investigate all claims against the county, and draw all contracts relating to the business of the county. He shall give his opinion, without fee, in matters of law in which the county is interested, and in writing when demanded, to the county court or any judge thereof, except in counties in which there is a county counselor. He shall, without fee, give his opinion to any magistrate court, if required, on any question of law in any criminal case, or other case in which the state or county is concerned, pending before the court."

According to your letter you are a county of the second class and have no county counselor.

Under Chapter 64 on county planning, and particularly the section that pertains to planning and zoning in class two counties, Section 64.510, RSMo 1959, provides that the county court may provide for a county plan; Section 64.520 provides for a county planning commission; and Section 64.530 provides that said planning be adopted after approval by the voters.

Section 64.540 of the Revised Statutes of Missouri, 1959, sets forth the rules, employees, expenses and general powers of the planning commission.

Section 64.540 is as follows:

"The county planning commission may create and adopt rules for the transaction of its business and shall keep a public record of

Honorable Brunson Hollingsworth

its resolutions, transactions, findings, and recommendations. The commission may appoint such employees as it may deem necessary for its work and may contract with planners and other consultants for such services as it may require and may incur other necessary expenses. The expenditures of county funds by the county planning commission shall not be in excess of the amounts appropriated for that purpose by the county court. The commission shall have such other powers as may be necessary and proper to enable it to perform the duties imposed upon it by law."

It will be seen from a reading of the above statute there is no reference whatsoever to the employment of legal counsel and in the absence of a specific statement authorizing the planning commission to employ an attorney to advise it on legal planning problems, it is incumbent on the prosecuting attorney of a county to so advise the commission.

It further appears that Section 56.070 concerning the duties of a prosecuting attorney specifically requires that the prosecuting attorney represent the county in all matters of law, and further that he should draw all contracts relative to the business of the county and shall give his opinion in matters of law in which the county is interested.

CONCLUSION

It is the opinion of this office that under Section 56.070, RSMo 1959, it is the duty of the prosecuting attorney to represent the county in all matters of law, draw up all contracts relating to the county and give his opinion without fee in matters of law in which the county is interested. That Section 64.540 pertaining to county planning and zoning does not delegate to the commission the authority to employ legal counsel but the commission must consult with and rely on the services of the prosecuting attorney whose duty it is to furnish such services.

The foregoing opinion, which I hereby approve, was prepared by my assistant, O. Hampton Stevens.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

FEEES & SALARIES: Sheriffs in Second Class counties may retain
SHERIFFS: civil fees as prescribed in Section 57.280,
RSMo 1959, only to amount allowed by Section
57.340, RSMo 1959, and are prohibited by Section 57.380, RSMo
1959, from retaining fees collected in criminal cases as out-
lined in Section 57.290, RSMo 1959. Sheriffs and their
deputies in Second Class counties may be reimbursed for travel
expense, incurred in making criminal investigations.

Opinion No. 132

July 15, 1964

Honorable Brunson Hollingsworth
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri



Dear Mr. Hollingsworth:

This opinion is in answer to your letter posing inquiries
in the following language:

"Query. In a County of the Second Class,
which contains less than one hundred
thousand inhabitants, may a Sheriff
retain any fees whatsoever described in
R.S.Mo. 57.280 or 57.290, other than
those allowed him under Section 57.340.
Also refer to 57.380.

"Query. With reference to R.S.Mo. 57.300
and 57.350, may the Sheriff and his
deputies be reimbursed for criminal in-
vestigation mileage for example, mileage
in the course of the investigation of an
unsolved burglary? See also 57.430
(Third and Fourth Class Counties) for
mileage in connection with persons accused
of a criminal offense."

Subsection 1 of Section 57.340, RSMo 1959, has specific
application to counties of the Second Class having a population
of less than one hundred thousand inhabitants, and provides as
follows:

"1. In counties of the second class,
which contain less than one hundred
thousand inhabitants, the sheriff may
withhold and retain, as compensation
for his official services in civil
matters, from the fees, penalties,
charges, commissions and other money

Honorable Brunson Hollingsworth

collected by him for his services in the matters, the sum of three thousand nine hundred dollars for each year of his official term. He shall not retain during any one month, except the last month of each year of his official term, a sum exceeding one-twelfth of the aforesaid three thousand nine hundred dollars, and any amount collected and received in excess of one-twelfth during any such month, shall be paid by him at the end thereof to the county treasurer. He may, during the last month of any year of his official term withhold from the amount collected and received by him for services in civil matters during the month, a sufficient amount as will cause his compensation for the official year to reach the sum of three thousand nine hundred dollars. If at the end of any year of his official term he has not collected and retained the sum of three thousand nine hundred dollars, he may withhold and retain a sufficient amount, from moneys collected by him in civil matters in the succeeding year of his official term, to cause his compensation for the official year for which he has not received his full compensation, to amount to three thousand nine hundred dollars."

It may readily be seen from the language found in subsection 1 of Section 57.340, RSMo 1959, quoted above, that such portion of the statute is directed to "fees, penalties, charges, commissions and other monies" earned and collected by the sheriff in "civil matters". To the extent that fee charges prescribed in Section 57.280, RSMo 1959, result from "civil matters", they may be retained by the sheriff pursuant to the directive found in subsection 1 of Section 57.340, RSMo 1959.

Section 57.290, RSMo 1959, prescribes fees to be charged by sheriffs in criminal cases, and any retention by the sheriff of such fees charged and collected is clearly prohibited by the following language appearing in Section 57.380, RSMo 1959:

"The sheriff in all counties of the second class shall charge, collect and receive, on behalf of the county, every fee, penalty, charge, commission and

Honorable Brunson Hollingsworth

other money that accrues to him or his office for official services rendered in civil and criminal matters, by virtue of any statute of this state, and all the fees, penalties, charges, commissions, and other money collected by him, shall at the end of each month be paid by him to the county treasurer, as provided in section 50.360, RSMo, less that amount of fees from civil matters which he is authorized to retain by section 57.340. He is not entitled to collect the per diem allowed to the sheriff as a member of the board of equalization and board of appeals, as provided in section 138.020, RSMo."

Based on the foregoing statutes your first question must be answered by concluding that the sheriff in a Second Class county having a population of less than one hundred thousand inhabitants may retain fees collected in civil matters as authorized by Section 57.280, RSMo 1959, only in an amount prescribed by Section 57.340, RSMo 1959; and his retention of fees to be collected in criminal cases under Section 57.290, RSMo 1959, is prohibited by Section 57.380, RSMo 1959, quoted above.

Your second question is whether sheriffs and deputies in Second Class counties are entitled to reimbursement for "criminal investigation mileage". As we understand your question, it involves necessary traveling expenses incurred in the course of the investigation of crimes, including those in which the culprit is unknown. Inherent in your question is the further basic question of whether such criminal investigation constitutes part of the official duties of a sheriff. In our opinion, this basic question must be answered in the affirmative.

In Maxwell v. Andrew County, 347 Mo. 156, 1.e. 163, 146 SW2d 621, the Supreme Court stated:

"It is true that the sheriff is under a legal duty to investigate alleged crimes and to suppress crime and arrest felons."

And Section 57.100, RSMo, spells out the duties of sheriffs generally in the following language:

"Every sheriff shall quell and suppress assaults and batteries, riots, routs, affrays and insurrections;

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shall apprehend and commit to jail all felons and traitors, and execute all process directed to him by legal authority, including writs of replevin, attachments and final process issued by magistrates."

We believe that both the Maxwell case and the statutory provisions above quoted impose upon sheriffs and their deputies in Second Class counties the duty of making necessary criminal investigations of the kind mentioned in your letter. The Maxwell case held, however, that absent statutory provision therefor, mileage and expenses incurred in connection with criminal investigations may not be paid to a sheriff. Thereafter, Sections 57.350, RSMo Cum. Supp. 1963, and 57.360, RSMo, were (in their original form) enacted as Sections 7 and 8 of Laws, 1945, page 1569, and these statutes have remained unchanged except as concerns the rate of reimbursement for mileage as set forth in Section 57.350.

A study of Section 57.350, RSMo Cum. Supp. 1963, has led us to the conclusion that it has no application to the payment of mileage in criminal investigations. Its purpose is to provide for reimbursement at the specified rate for all miles actually and necessarily traveled in serving summonses, subpoenas, processes, writs and notices. Such mileage is computed from the place where court is usually held (except when court is usually held in more than one place), a provision which would not reasonably have reference to criminal investigations.

However, it is our opinion that Section 57.360, RSMo, does authorize reimbursement, as hereinafter set forth, for travel expenses incurred in criminal investigations. This section provides, in part, as follows:

"The sheriff and his deputies shall be reimbursed out of the county treasury, for actual and necessary traveling expenses, incurred in the performance of their official duties, in addition to the mileage above provided."

We construe Section 57.360 (which, as above pointed out, was enacted as a part of the same act as the original Section 57.350) to mean that in addition to those situations covered by Section 57.350 in which the sheriff is entitled to reimbursement for actual and necessary mileage expense, the sheriff is also entitled to be reimbursed for his actual and necessary travel expenses incurred in the performance of duties which are not included within the provisions of Section 57.350, and this would, of course, include reimbursement for actual and necessary travel expenses incurred in criminal investigations.

Honorable Brunson Hollingsworth

Section 57.360 requires the sheriff to make a written claim for reimbursement for his travel expenses, setting forth all detailed and pertinent information specified by the county court in order to approve the payment thereof. Although this statute does not authorize the payment of mileage, as such, it is our opinion that the county court is authorized, in its discretion, to approve a claim for reimbursement for travel expenses either at a rate per mile or actual out of pocket expenses or other reasonable determination which the county court finds under the circumstances will not be in excess of the actual and necessary expenses incurred by the sheriff and his deputies in traveling in the course of making criminal investigations.

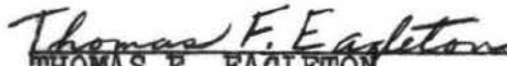
CONCLUSION

It is the opinion of this office that a sheriff of a Second Class county may retain fees collected in civil cases pursuant to Section 57.280, RSMo, only in the amount allowed by Section 57.340, and that none of the fees collected in criminal cases pursuant to Section 57.290, RSMo, may be retained by the sheriff.

It is the further opinion of this office that a sheriff is entitled to reimbursement only for his actual and necessary travel expenses in making criminal investigations and that he can be reimbursed mileage in connection with such services only to the extent that the county court finds under the circumstances that such mileage does not exceed the actual and necessary travel expenses incurred in traveling in the course of such investigation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

COUNTY BOARDS OF EDUCATION: All residents of a school district
ELECTIONS: shall vote as prescribed by law upon
SCHOOLS: the county board of education (Section
SCHOOL DISTRICTS: 165.657, RSMo 1963 Cum. Supp.) which
has jurisdiction over their district
regardless of what county the voter lives in. Where a part of a
school district projects outside the county and is contiguous to
both county court districts, the county court district line is to
be also projected so as to bisect the whole district and all voters
of the district are to vote upon those members of the county board
of education to be elected from the area on that side of the bi-
secting line in which the voter resides.

March 18, 1964

Opinion No. 133

Honorable Rolin T. Boulware
Prosecuting Attorney
Shelby County
Shelbyville, Missouri



Dear Mr. Boulware:

This opinion is issued in response to your request of
March 12, 1964, for an official opinion of this office.

Your inquiry relates to Section 165.657, RSMo 1963 Supp.
This statute creates county boards of education and provides
for their election. We understand the facts from which your
inquiry arises to be as follows: The Shelby County R-IV
Reorganized School District overlaps the Shelby County - Monroe
County line. The Shelby County School District also overlaps
the line which divides the Eastern and Western County Court
Districts of Shelby County. The part of the Shelby County
School District which lies outside Shelby County and in Monroe
County is contiguous to both the Eastern and the Western County
Court Districts of Shelby County. For clarity, we illustrate
these facts by the map sketch attached at the end of this
opinion.

We understand your inquiry to be twofold:

1. Do those residents of the Shelby County R-IV Reorganized
School District who live outside Shelby County and in Monroe
County vote on the Shelby County Board of Education or on the
Monroe County Board of Education?
2. If these people vote for the Shelby County Board of
Education, do they vote for the members to be elected from the
Eastern County Court District of Shelby County or for members
to be elected from the Western County Court District of Shelby
County?

March 18, 1964

At the beginning let us clearly define the nature of school districts and their relationship to counties. School districts are political subdivisions in themselves, as are counties. School districts are separate legal entities from counties.

"The school districts are organized as separate legal entities. School Dist. No. 7 v. School Dist. of St. Joseph, 184 Mo. 140, 156, 82 S.W. 1082, 1086. They are public corporations, form an integral part of the state, and constitute that arm or instrumentality thereof discharging the constitutionally intrusted governmental function of imparting knowledge and intelligence to the youth of the state that the rights and liberties of the people be preserved." School Dist. of Oakland v. School Dist. of Joplin, Mo., 102 S.W.2d 909, 910.

Accord: State v. Holmes, Mo., 231 S.W.2d 185, 193; 78 C.J.S., Schools and School Districts, §25b. Being separate entities, territorial boundaries of school districts do not and need not coincide with nor respect the boundaries of counties or other political subdivisions.

By Section 165.657 et seq., the Legislature has created county boards of education and for certain purposes placed all school districts under the jurisdiction of a county board. Where a county board of education has authority over a school district it has authority over the whole district regardless of the fact that part of the district may lie in another county. Note, for example, Section 165.677, RSMo 1959, which provides that where a reorganized district is created with territory in more than one county, the district will belong to the county containing the greater portion of the district's assessed valuation.

The territorial boundaries of a county board of education are co-extensive with the territorial boundaries of the school districts within the county board's authority. The name county board of education is somewhat misleading because as school districts are separate political entities and may overlap county lines, so also the territorial boundaries of the authority of a county board of education may overlap county lines. The territorial authority of the county board and the boundaries of the county need not be co-extensive.

In a manner of speaking, the outside boundaries of the school districts which are under the jurisdiction of a particular county board of education define a confederation of separate legal entities. This "confederation" is referred to by the name of the county which most closely coincides with its boundaries.

I.

Having so defined the relationship of counties and school districts, let us resolve your first question. In the present case, Shelby County R-IV School District apparently is under the authority of the Shelby County Board of Education, and although a smaller part of the district lies outside of Shelby County, the whole district is under the jurisdiction of the Shelby County Board of Education. It follows that all residents of the Shelby R-IV District shall vote upon the Shelby County Board of Education, which board has jurisdiction over their district. This, regardless of whether the voter lives in Shelby County, Monroe County or any other county.

It is our opinion that all residents of a school district shall vote upon the county board of education which has jurisdiction over their school district regardless of what county the voter lives in. As applied to your instant inquiry, those residents of Shelby County R-IV Reorganized District who live in Monroe County are to vote upon candidates for the Shelby County Board of Education and not for candidates for the Monroe County Board of Education.

II.

Having determined that all residents of a school district are to vote for the county board of education which has jurisdiction of their district, we turn to determine which members they shall vote upon, those to be elected from the Eastern or those from the Western County Court District of Shelby County.

In a prior opinion this office has ruled that in second, third and fourth class counties the three members to be elected from each county court district shall be elected only by the voters of their respective area. (Opinion No. 14 issued January 10, 1964, to Darold Jenkins.)

In creating county boards of education the Legislature limited the membership of the six-member board to not more than three members from one county court district. This limitation prevents one area from controlling the membership of the board. The Legislature could have divided the territory of the county board of education in any fashion. Rather than

establishing a new line to divide the area into two major parts, the Legislature adopted an existing dividing line, the county court district line. This dividing line has no peculiar significance other than to implement the Legislature's intent to distribute the membership of the board.

Under the laws of this State, school district boundaries are not limited by either county court district or county lines. School districts, as evidenced by the Shelby County R-IV district, do overlap both county court district and county boundaries. The Legislature enacted the laws that make this overlapping possible. We must presume the Legislature, being aware of the clear effect of its enactments, knew that school districts overlapped both county court district and county boundaries.

Being aware of this overlapping, the Legislature adopted the county court district line as a dividing line. This line bisects school districts wholly within a county. Nothing in Section 165.657 indicates that parts of school districts which lie outside of a county should be treated differently.

Therefore, it is our opinion that where a part of a school district, contiguous to both county court districts, projects outside of the county, the county court district line should also be projected outside the county bisecting the part. Accordingly, the residents of the part of district contiguous to one county court district would vote for members to be elected from that county court district and the residents of the part contiguous to the other county court district would vote for members to be elected from that district. That is, the residents of the part of the school district outside the county will vote in the same manner and for the same candidates as those residents of the part of the school district within the county.

The Shelby County Court District line runs north and south. Applying our ruling to your instant inquiry: The line would be projected south bisecting that part of Shelby County R-IV School District which lies outside the county. (See map sketch infra.) Those living east of the projected line would vote for the Shelby County Board of Education members to be elected from the Eastern County Court District and those living west of the line for the Western District members.

To answer both questions presented here as succinctly as possible: All residents of a school district vote upon the county board of education which has jurisdiction over their school district and upon those members to be elected from the area on that side of the county court district line in which the voter resides.

March 18, 1964

The first election of county boards of education under Section 165.657, RSMo 1963 Supp., is to be held April 7, 1964. The conclusions expressed in this opinion concern the conduct of that election. The right to vote upon those who represent us is a cardinal principle of our democratic society. We are concerned that all residents of all parts of all school districts have the opportunity to vote as prescribed by law and that this right not be frustrated by misunderstanding. Therefore, we have requested the Department of Education to promptly forward copies of this opinion to those charged with conducting the election.

CONCLUSION


Therefore, it is the opinion of this office:

1. That all residents of a school district shall vote as prescribed by law upon the county board of education (Section 165.657, RSMo 1963 Supp) which has jurisdiction over their district regardless of what county the voter lives in.

2. That where a part of a school district projects outside the county and is contiguous to both county court districts, the county court district line is to be also projected so as to bisect the whole district and all voters of the district are to vote upon those members of the county board of education to be elected from the area on that side of the bisecting line in which the voter resides.

The foregoing opinion which I hereby approve was prepared by my assistant, Louis C. DeFeo, Jr.

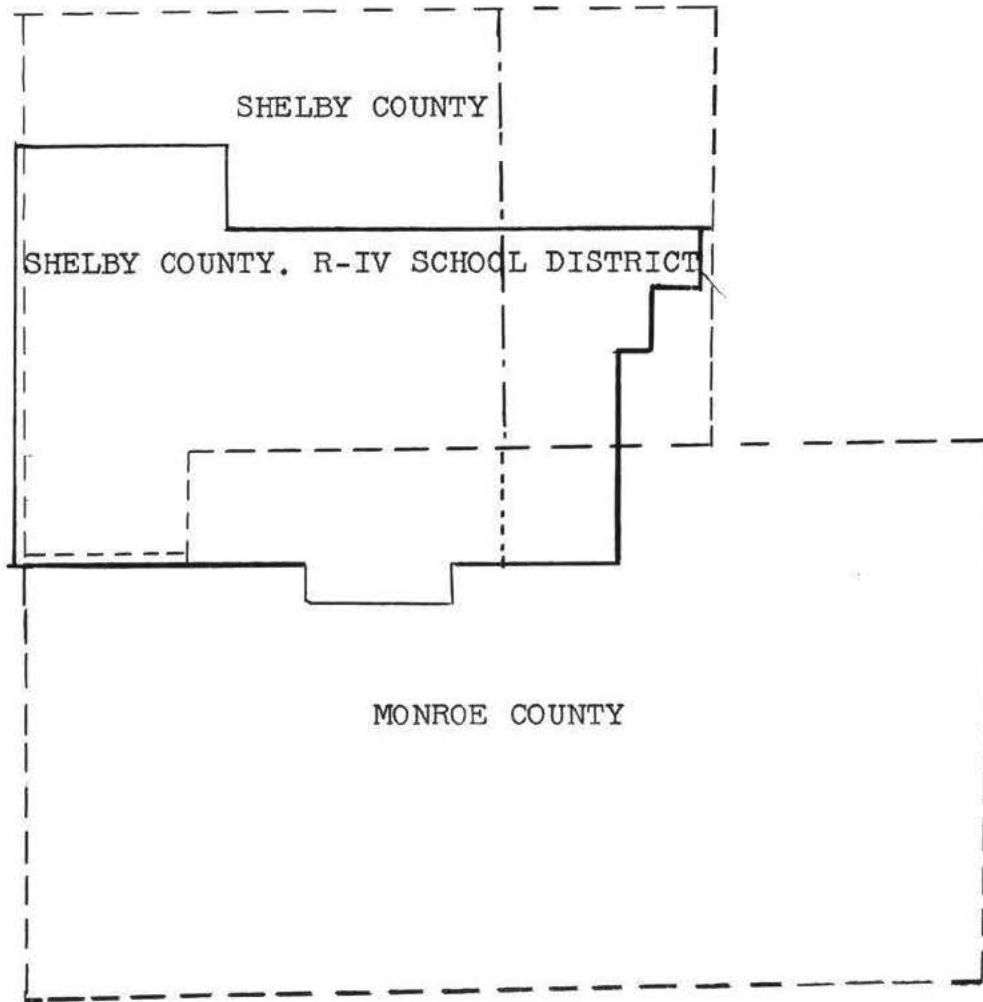
Yours very truly,


THOMAS F. EAGLETON
Attorney General

Attachment

Opinion No. 133

March 18, 1964



- Shelby Co. R-IV School District Boundary
- County Boundary Lines
- .-.-.- County Court District Line of Shelby County
- Projection of County Court District Line
into Monroe County.

PUBLIC ADMINISTRATOR: The public administrator is an elected county official and must file with the county clerk a certified list of all fees received for performance of his statutory duties as provided by Section 51.150, paragraphs (5) and (6), RSMo Supp. 1963.

Opinion No. 135

April 24, 1964

Honorable John B. Mitchell
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Mr. Mitchell:

This is in answer to your request for an opinion from this office as to whether or not a public administrator is required to file a statement of salaries and nonaccountable fees as provided in paragraphs (5) and (6), Section 51.150, RSMo Supp. 1963.

These paragraphs which were added by the 1963 Legislature to Section 51.150 require the county clerk:

"(5) To compile and keep a list of all salaries and nonaccountable fees received by each elected county official by virtue of his office for each calendar year. The source of each fee shall be itemized, the amount of mileage allowance received shall be reported, and the total fees less expenses shall be shown. Each elected official shall certify and give the necessary information on his office to the clerk of the county court; (Emphasis added).

"(6) To file a certified list of all salaries and nonaccountable fees received by each elected county official by virtue of his office for the preceding calendar year before March first with the secretary of state."

There is no doubt that the public administrator is an officer of the county by the terms of Sections 473.730 - 473.773, RSMo 1959. He is elected for a term of four years; is required to take an official oath and give bond, Section 473.730; and by

statute is declared to be an officer of the county in which he is elected, Section 473.737. An examination of Section 473.743 discloses that the duties of a public administrator include the preservation and administration of estates and he is also an ex-officio public guardian and curator of the county in which he is elected. He holds the same powers and duties as are enjoined upon executors and administrators, guardians and curators, Section 473.750. Section 473.740 provides that the public administrator shall receive the same compensation for his services as may be allowed by law to executors and administrators unless the court, for special reasons, allows a higher compensation. The allowable compensation of executors and administrators is set out in Section 473.153. Prior to the amendment to Section 51.150, supra, the public administrator did not have to report or account for the receipt of this compensation.

The public administrator is a county official and is elected. Although he receives no salary, he does receive fees for performing the statutory duties of his office. The fact that his fees are taken from private estates rather than state or county sources does not render them anything other than fees. We therefore believe that the public administrator must provide the clerk of the county court with a certified copy of his fees as required by paragraph (5), Section 51.150, RSMo Supp. 1963. It should be noted that this paragraph requires that the source of each fee be itemized and the total fees less expenses should be shown.

CONCLUSION

It is the opinion of this office that the public administrator is an elected county official and must file with the county clerk a certified list of all fees received for performance of his statutory duties as provided by Section 51.150, paragraphs (5) and (6), RSMo Cum. Supp. 1963.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

INSURANCE: Articles of Incorporation of Mid-West National Fire
and Casualty Insurance Company.

Opinion No.136

March 18, 1964

Honorable Ralph H. Duggins
Superintendent of the Division of Insurance
Jefferson Building
Jefferson City, Missouri



Dear Sir:

Pursuant to your request of March 12, 1964, an examination has been made of an executed copy of Declaration of Intention, including Articles of Incorporation, of the proposed Mid-West National Fire and Casualty Insurance Company, together with proof of publication thereof as required by Section 379.040 RSMo 1959.

It is the opinion of this office that the documents referred to in the preceding paragraph are in conformity with Sections 379.010 to 379.160 RSMo 1959, as amended, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO/dg

May 19, 1964



Honorable Daniel V. O'Brien
Prosecuting Attorney
St. Louis County
Court House
Clayton, Missouri 63105

Dear Mr. O'Brien:

This office is in receipt of your request for a legal opinion. You advise that at various times the Coroner of St. Louis County has possession of guns used as the instruments of the deaths of persons, and which deaths have been investigated by the coroner. Subsequent to said investigations, the coroner has released the guns to relatives of the deceased, and the specific inquiry for which an opinion has been requested, reads as follows:

"The Coroner is desirous of learning whether or not he is acting in a proper manner in turning the guns over to other than the former legal owners in spite of the Missouri Statutes regulating the giving away or transferring of weapons only after obtaining a permit to do so."

In an opinion of this office written for Honorable Jasper M. Brancato, on August 23, 1963, Question No. 3 was: "Who is responsible for property found on or near dead bodies?"

That opinion pointed out that the sheriff or police, as the case may be, have the duty to protect the property of a deceased person during the interim period between the discovery of the deceased and take over of personal property by the deceased's personal representatives, subject to the exception in Section 548.490 RSMo 1959. Said section provides that within thirty days after

May 19, 1964

an inquest, the coroner shall turn over possession of money or other property found upon a dead body, unless claimed in the meantime by the personal representatives of the deceased, to the county or city treasurer.

It is believed that the conclusion reached on the third inquiry of the above-mentioned opinion answers that part of your inquiry as to what persons the coroner should turn over possession of guns of the deceased.

In view of the reference made in the latter portion of your inquiry relating to Missouri statutory requirements that transferees of small firearms must obtain a permit authorizing them to acquire same, we find it necessary to discuss this portion of the inquiry.

This reference is to Section 564.630, RSMo 1959, which provides:

"No person ... shall directly or indirectly buy, sell, borrow, loan, give away, trade, barter, deliver or receive, in this state, any pistol, revolver or other firearm of a size which may be concealed upon the person, unless the buyer, borrower or person receiving such weapon shall first obtain and deliver to, and the same be demanded and received by, the seller, loaner, or person delivering such weapon, within thirty days after the issuance thereof, a permit authorizing such person to acquire such weapon."

The transfer of possession of a firearm of the type referred to in the statute from the sheriff, police, or coroner to an executor or administrator does not require a permit because such executor or administrator does not own such firearm but is a legal trustee and conduit for the purpose of distributing the estate of the decedent.

Honorable Daniel V. O'Brien

-3-

May 19, 1964

If, however, the proposed transfer of the firearm is to be made to some relative of the decedent as an individual and not as an executor or administrator, then the permit required by Section 564.630 RSMo 1959, should be complied with.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

Enclosure

May 7, 1964



Honorable Maurice Schechter
State Senator, 13th District
41 Country Fair Lane
Creve Coeur 41, Missouri

Dear Senator Schechter:

Your opinion request of March 17, 1964, reads as follows:

"On March 4th you rendered an opinion requested by me regarding salary payments to Marshall - Collectors in 4th class cities.

"Your opinion does not answer the question involved and probably caused by my original query.

"An election will be held on April 7, 1964 and the Ordinance increasing the salaries was passed prior to such date and the Ordinance provides that "these provisions shall be applicable to the Collector - Marshall - Chief of Police following the general municipal election in April 1964".

"In my letter of February 11th, I set out the starting salaries scale and the various increases after service up to 66 months and please bear in mind the elective office is only for a period of 2 years but if the elected official is elected and re-elected and holds his office for 66 months, he would be receiving top salary.

"This Ordinance was enacted by the City of Overland and I believe that one other city in St. Louis County has the same type Ordinance and there is a question as to whether the same is in violation of Section 79.270.

"May I please have your opinion on this matter at your earliest convenience."

We have been unable to find any Missouri cases which are applicable to the specific question which you have submitted. We have also consulted several texts on municipal corporations, including Corpus Juris Secundum, American Jurisprudence, McQuillin on Municipal Corporations and Rhyne on Municipal Corporations, with the same result. We have also contacted the Missouri Municipal League and the National Institute of Municipal Law Officers in Washington, D.C., and they have been unable to supply us with any citation of legal authority applicable to the question which you have submitted.

Section 13 of Article VII of the Missouri Constitution provides as follows:

"Limitation on increase of compensation and extension of terms of office.-- The compensation of state, county and municipal officers shall not be increased during the term of office; nor shall the term of any officer be extended."

Section 79.270, RSMo 1959, which is applicable to fourth class cities, provides as follows:

"Salaries fixed by ordinance.-- The board of aldermen shall have power to fix the compensation of all the officers and employees of the city, by ordinance. But the salary of an officer shall not be changed during the time for which he was elected or appointed."

It may be reasonable to assert that the above prohibitions are directed against a change of salary during the term of the officer and do not prohibit a change by operation of law where the applicable law and ordinance was enacted prior to the election of the officer. In support of this argument, municipal cases have held that a change in salary caused by population changes or change in classification of a city, would not be prohibited. This was the conclusion reached in the case of State ex rel. Harvey v. Linville et al., 300 SW 1066, wherein the court held that where the compensation of an officer depends on population and automatically increases with an increase in the population, then prohibition against a change in salary during the term would be inapplicable.

On the other hand, it must be conceded that the above quoted constitutional provision does prohibit an increase during the term of office. In the case of *State v. Jost*, 191 SW 38, it was held, generally, that a police officer's salary could not be changed during his term of office; however, the facts in that case were in several respects different than the facts which you have submitted. In the present instance we have an elective office with a two year term. Each term is separate and distinct from any prior term which may have been served by the victorious candidate. It may be reasonably argued that the amount of compensation payable to an officer who is elected at a particular election should not be dependent on whether Candidate A (the incumbent) or Candidate B, was the winner of the election. It may be that to discriminate under these circumstances as to the amount of compensation payable with respect to a particular officer on the ground that one candidate had heretofore been elected to the office and the other had not, would be contrary to public policy. In other words, it may be said that the salary for a particular office should be the same irrespective of the identity of the individual who may be elected to the office.

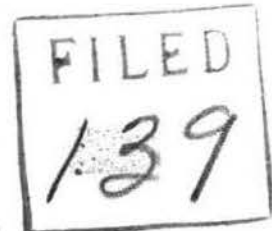
In summary, the question which you submit appears to be one of first impression and we have been unable to find any satisfactory authority on which to base an answer. Therefore, we recommend that the validity of this ordinance be tested by a declaratory judgment suit.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CB:df

July 1, 1964



George A. Ulett, M. D.
Director, Division of Mental
Diseases
722 Jefferson Street
Jefferson City, Missouri

Dear Dr. Ulett:

This is in response to your letter of March 12, 1964, requesting an opinion of the Attorney General on the question of whether the Division of Mental Diseases of the Department of Public Health and Welfare of Missouri could be legally designated as the "State mental health authority" for the State of Missouri to receive and utilize Federal grants under the Federal Public Health Service Act.

The Constitution of Missouri, Article III, Section 38(a), states:

" * * * Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

The Legislature has appropriated to the Division of Mental Diseases of the Department of Public Health and Welfare for the biennium ending June 30, 1965, all allotments of Federal funds received for the use of the Division in carrying out the Federal provisions of the mental health program.

George A. Ulett, M. D.
Director, Division of Mental
Diseases

July 1, 1964

Laws of Missouri, 1963, pages 32 and 35, provides as follows:

"There is appropriated out of the State Treasury, chargeable to the fund and for the agency and purpose designated, for the period beginning July 1, 1963 and ending June 30, 1965, as follows:

* * * * *

"Section 5.140. Division of mental diseases--
research grant award.--To the Division of
Mental Diseases

"For Research Grant Award

"All allotments, grants and contributions from the federal government, private foundations, or pharmaceutical companies paid into the state treasury under the provisions of the 'Research Grant Award' under Section 301 (d) of the Public Health Service Act, as amended, or any other acts of Congress which provide federal funds or funds from any other source for the use of the Division of Mental Diseases in carrying out the federal provisions of the Mental Health Program.

"From Federal Funds"

Turning to the Federal Public Health Service Act, 42 USC 201 (m) thereof provides:

"The term 'State mental health authority' means the State health authority, except that, in the case of any State in which there is a single State agency, other than the State health authority, charged with responsibility for administering the mental health program of the State, it means such other State agency."

George A. Ulett, M. D.
Director, Division of Mental
Diseases

July 1, 1964

That the Division of Mental Diseases is the single state agency charged with the responsibility for administering the mental health program of the state appears in Section 202.020, RSMo. 1959, in the following language:

"The division of mental diseases of the state department of public health and welfare shall have the care and treatment of persons suffering from mental diseases * * *"

It follows that the Division of Mental Diseases may properly be designated as the Mental Health Authority under the Public Health Service Act.

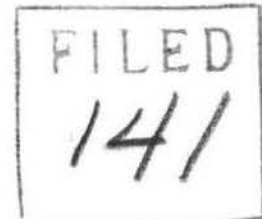
It is our view that the Division of Mental Diseases of the Department of Public Health and Welfare of the State of Missouri may be legally designated as the Mental Health Authority for the State of Missouri for receiving and using Federal funds under the Federal Public Health Service Act.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

cc: Dr. Hardwicke
C. Rouss Gallop, Director
Department of Public Health
and Welfare

July 14, 1964



Honorable Brunson Hollingsworth
Prosecuting Attorney
Jefferson County
Courthouse
Hillsboro, Missouri

Dear Mr. Hollingsworth:

This letter is in answer to your request for an opinion of this office on the questions whether the collector of Jefferson County may properly charge the clerk's and collector's fees on each tract of real estate for delinquent taxes provided for in Section 140.100, RSMo, and whether the collector may charge a commission of two percent of all sums collected pursuant to Section 52.290, RSMo Cum. Supp. 1963.

Section 52.361, RSMo 1959, governs the situation with respect to delinquent lists in second class counties. Said section provides as follows:

"It shall be the duty of the county collector in class two counties to prepare and keep in his office back tax books which shall contain and list all delinquent taxes on real and personal property levied and assessed in the county which remain due and unpaid after the first day of January of each year. Such back tax books shall replace and be in lieu of all 'delinquent lists' and other back tax books heretofore prepared by the collector or other county officer."

It is clear that the fees provided in Section 140.100, RSMo, are not applicable to second class counties because such fees are chargeable only for services of the clerk and collector in connection with "delinquent lists" no longer prepared in second class counties.

Honorable Brunson Hollingsworth -2-

Section 52.290, RSMo, allows the collector a commission on delinquent and back taxes of two percent of all sums collected. This refers to the collectors of all counties and is, therefore, a legal charge; however, such commissions must be turned over to the county treasury of second class counties and the collector is accountable therefor. This is by virtue of Section 52.420, RSMo Cum. Supp. 1963, and Section 52.430, RSMo, providing that in second class counties the collector's salary shall be "in lieu of all fees, commissions, penalties, charges and other compensation now charged, received or allowed by virtue of any statute, to any such collector as compensation for his services", and forbidding collectors from retaining any other compensation.

Further, Section 50.350, subsection 1, RSMo Cum. Supp. 1963, provides:

"It shall be the duty of every county officer, in all counties of the second class, who shall be paid an annual salary in lieu of all fees, penalties, commissions, charges, emoluments, and moneys due him or his office for any service performed, to charge, collect and receive, upon behalf of the county, every fee, penalty, commission, charge, emolument and money that accrues in his office for any service rendered, by virtue of any statute of this state, except such fees as are chargeable to the county."

This statute requires the county collector of a second class county to turn over to the county treasury all statutory fees, penalties, etc., that accrue to his office.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

DLR:lt

FILED

142

May 13, 1964

Opinion No. 142
Answered by letter

Honorable Ronald M. Belt
State Representative
115 1/2 Vine Street
Macon, Missouri

Dear Mr. Belt:

This letter is in response to your request of March 18, 1964, for an official opinion of this office. You inquire:

"Under the provisions of Subsection (1) of Section 120.545 if an incumbent dies or becomes disqualified after the closing of the filing period for any Primary Election, the statute provides that filing for the office shall be reopened for a period of five days. I request your opinion as to whether or not this reopening for a period of five days would apply if there were candidates other than the incumbent who had previously filed prior to the closing of the filing period."

Section 120.545, RSMo 1963 Supp., provides:

"1. Except as provided in subsection 2, if a candidate for nomination to an office of which he is the incumbent dies, withdraws or becomes disqualified after the close of the filing period for any primary election, filing for the office shall be reopened for a period of five days following the death, withdrawal or disqualification during which period new candidates may enter and file their declarations of candidacy.

"2. If a candidate for nomination to an office of which he is the incumbent dies, withdraws or becomes disqualified following the sixteenth day next preceding the date of the primary election the election and canvass shall proceed and if a sufficient number of ballots are marked as being voted for the deceased to entitle him to nomination had he lived until after the election a vacancy exists on the general election ballot which shall be filed in the manner provided in section 120.550.

"3. This section shall not apply if the incumbent was the sole party candidate for nomination to the particular office."

Section 120.545 (1) is applicable to only one situation, that is, when the incumbent of an office dies, withdraws or is disqualified after the close of filing for such office and there are one or more other candidates filed on the same party ticket for that office, then the filing period is reopened for a period of five days following such death, withdrawal or disqualification.

We call your attention to Section 120.550, RSMo 1959, which applies when a vacancy in the candidates for nomination as a party candidate exists.

Therefore, the provisions of Section 120.545, RSMo 1963 Supp., apply if the candidates for nomination are the incumbent and others and the incumbent dies, withdraws or becomes disqualified after the close of the filing period for any primary election.

Very truly yours,

THOMAS F. KAGLETON
Attorney General

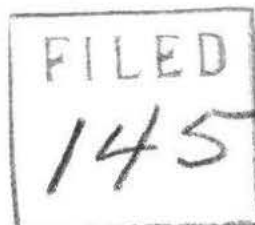
LCD/dg

AIRPORTS: County may issue bonds for acquiring an airport
and for erecting buildings thereon and for equip-
BONDS: ping said airport for the purpose for which it
was constructed.

June 2, 1964

OPINION NO. 145

Honorable Douglas Mahnkey
Prosecuting Attorney
Taney County
Forsyth, Missouri



Dear Mr. Mahnkey:

In your letter of March 25, 1964, you state that the County Court of Taney County intends to hold a bond election to develop an airport, the bond money to be used for:

- (1) Purchase of real estate;
- (2) Building a landing strip; and
- (3) Such buildings necessary for shop and office space.

You question whether the money may be used for any purpose other than the purchase of the real estate under Sections 305.200 and 305.210, RSMo 1959, relating to "Airports".

Section 305.210, provides that a county, having established an airport, may construct, improve, equip and maintain the same and that the expense of such construction, improvement, equipment and maintenance shall be a county charge. Because Section 305.200(3) does not expressly provide that money from the bonds may be used for construction of buildings and facilities and equipping such buildings, you raise the question as to whether construction and equipment is within the intended purpose of said section.

First, we note the quite broad language of Section 305.200(3), as follows:

"The purchase price * * * of any real or personal property or any easement or use

Honorable Douglas Mahnkey

therein acquired for an airport * * *
may be paid for wholly or in part from
the proceeds for the sale of bonds. * *"

Article VI, Section 26(b), Constitution of Missouri, 1945, as amended November 4, 1952, confers upon a county the authority to incur indebtedness " * * * for state or county purposes * * *." This section, as a part of the Constitution of 1875 (Article X, Section 12) was held to be self-enforcing in State ex rel. Gilpin v. Smith, 96 S.W. 2d 40, and permits a county to incur an indebtedness for any county public purpose if authorized by a two-thirds vote of the people voting at an election on such proposition if such indebtedness be within the amount permitted by the Constitution. This authority granted by the Constitution may not be limited by any rule of statutory construction.

In 1928, the Supreme Court of Missouri, en banc, in Dysart v. City of St. Louis, 11 S.W. 2d 1045, held that a municipality might acquire land for an airport as a "public purpose" by virtue of the Constitution of 1875, Article X, Sections 3 and 11. A citizen brought the suit to restrain the city from issuing the bonds previously voted. The Supreme Court held that the city could properly issue the bonds and build the airport because it was a public purpose.

In 1929, the Legislature passed an Act authorizing cities and counties to acquire and operate airports. Laws of 1929, page 276.

The six sections in the Laws of 1929 are practically the same as the sections of our statute now under consideration.

Under these sections the county is authorized to acquire the property under Section 305.200. The use of the language in Section 305.200(3), "The purchase price * * * of any real or personal property * * *" indicates a legislative intent to use the most all-inclusive language. The construction of runways or buildings involves the purchase of personal property and when put into its intended use becomes real property. The purchase of office equipment, tools, machines

Honorable Douglas Mahnkey

and other items necessary to make the airport function is personal property. These purchases all are within the legislative contemplation and intent. Under Section 305.210, it is authorized to "construct, improve and equip the airport." It was clearly the purpose of the Legislature when this Act was originally enacted in 1929, and later revised in 1943, to provide that the bond money be used for erecting buildings and equipping them.

The case of State ex rel. Davis v. Barber, 190 So. 809 (Fla.), holds that where bonds were issued to erect, construct, furnish and equip a courthouse, the structure was not complete until there was added "other essential adjuncts that are a component part of the completed structure and without which it would be useless. * * *"

The word "equip" has been held to mean, "to provide all that is necessary for a successful undertaking." Polliak v. Smith, 88 A. 2d 351, 353, 19 N.J. Sup. 365.

In Moore v. Gordon, Texas Civil Appeal, 122 S.W. 2d 239, 242, and in Peter Kiewit Sons Company v. State of North Dakota, 116 N.W. 2d 619, 622, the court held that an "airport" is a tract of land adopted and maintained for the landing and take-off of aircraft and at which facilities for their shelter, supply and repair are provided.

Our courts have universally held that in interpreting statutes, we must consider their primary purpose as well as the history of the legislation.

Rector v. Tobin Construction Co., 351 S.W. 2d 816, 1.c. 822, states:

"In construing a statute we must seek to gather the intent of the legislature from the ordinary meaning of the words used, considering the whole Act and its legislative history. * * *"

(Emphasis Added.)

Honorable Douglas Mahnkey

The Supreme Court of Missouri, in *Re Tompkins' Estate*, 341 S.W. 2d 863, 1.c. 872, has set out the following rules to be used in interpreting the legislative intent: (1) The object sought to be obtained and the evil sought to be remedied by the Legislature; (2) The legislative purpose should be assumed to be a reasonable one; (3) Laws are presumed to have been passed with a view to the welfare of the community; and (4) It was intended to pass an effective law, not an ineffective or insufficient one.

When the Legislature passed these statutes, it authorized the acquisition and construction as well as the equipping of airports and declared such projects to be legal county public purposes.

CONCLUSION

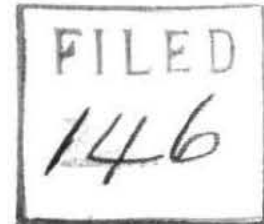
We are of the opinion that Taney County, when authorized by a two-thirds vote authorizing the issuance of bonds, can issue bonds for the purpose of acquiring by purchase an airport and may construct buildings and facilities thereon, and may equip them in such a manner as is necessary for the maintenance and operation of said airport under the provisions of Sections 305.170 to 305.220, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

April 3, 1964



Honorable A. M. Spradling, Jr.
State Senator, 27th District
1838 Broadway
Cape Girardeau, Missouri

Dear Senator Spradling:

This is in answer to your request for an opinion of this office as to whether or not a St. Louis hospital management survey is a public record under Section 109.180, RSMo Cum. Supp. 1963.

Section 109.180, RSMo Cum. Supp. 1963, reads as follows:

"Except as otherwise provided by law, all state, county and municipal records kept pursuant to statute or ordinance shall at all reasonable times be open for a personal inspection by any citizen of Missouri, and those in charge of the records shall not refuse the privilege to any citizen. Any official who violates the provisions of this section shall be subject to removal or impeachment and in addition shall be deemed guilty of a misdemeanor and upon conviction shall be punished by a fine not exceeding one hundred dollars, or by confinement in the county jail not exceeding ninety days, or by both the fine and the confinement." (Emphasis supplied.)

It is our view that under the precise wording of this section the right of public inspection extends only to records "kept pursuant to statute or ordinance." We have found no statute or ordinance requiring the keeping of this survey, although of course there was an ordinance passed appropriating money to have the survey made.

Honorable A. M. Spradling, Jr. - 2.

April 3, 1964

Attached is a copy of a recent official opinion of this office of March 5, 1963 to the Honorable W. H. Bates, which discusses Section 109.180, RSMo Cum. Supp. 1963.

Since you were the author of Sec. 109.180, sometimes known as the Open Public Records Statute, I fully appreciate your interest therein. I concur fully with your thinking that a survey of this type paid for at considerable expense with taxpayers' money should be made available to the public. If St. Louis officials are unwilling to make available information of this type, then I believe that it will be necessary to amend Sec. 109.180 so as to require that any record "kept pursuant to or authorized by statute or ordinance" shall be made public.

Yours very truly,

TFE:oh
enc.

THOMAS F. EAGLETON
Attorney General

STATE RETIREMENT BOARD: An employee of the Missouri Commission on Higher
COMMISSION ON HIGHER Education is not eligible for membership in the
EDUCATION: University of Missouri Retirement Plan. However,
UNIVERSITY OF MISSOURI: he must become a member of the Missouri State Em-
ployees' Retirement System at the time of his
employment with the Commission.

April 1, 1964

Opinion No. 147

Mr. Philip M. Sestric
Vice Chairman
Missouri Commission on
Higher Education
705 Olive Street
St. Louis 1, Missouri



Dear Mr. Sestric:

This is in reply to your opinion request of March 23, 1964, in which you ask:

"The Commission has employed an Executive Secretary and an office staff of one secretary. In addition thereto, it is anticipated that the Commission will employ two additional specialist[s] and one additional office secretary. In the Bill creating the Commission and authorizing employment of needed personnel, no mention was made as to retirement benefit plan in which these employees would be placed. In general discussion had by members of the Commission, it appeared that these employees could very well be placed in the University of Missouri Retirement Plan, especially the Executive Secretary and other specialists who shall be employed."

The Missouri Commission on Higher Education was established by Section 173.010, RSMo Cumulative Supplement 1963, which provides:

"There is hereby established the 'Missouri Commission on Higher Education', consisting of ten members appointed by the governor and an 'Advisory Council to the Commission', composed of members appointed by the commission, the members of both bodies to be appointed in accordance with the provisions of this chapter."

The employed personnel for said commission is provided for by Section 173.090, which states:

"The division of budget and comptroller shall make available such services as may be requested by the commission. The commission may employ, within the limits of and in compliance with appropriations and grants made available to it, such professional, clerical and research personnel as may be necessary to assist in performing its duties under the provisions of this chapter."

Section 109 of the Conference Committee Substitute for House Bill No. 15 of the 72nd General Assembly contains an appropriation of \$99,945.00 for the Missouri Commission on Higher Education (\$72,315.00 - Personal Service, \$3,630.00 - Additions, \$24,000.00 - Operations). This bill specifically provides that this appropriation is chargeable from the General Revenue of the State Treasury.

The legal basis for the University of Missouri Retirement Plan is spelled out in Section 172.300, RSMo 1959. Said statute states, in part, that the Board of Curators may appoint and remove employees of the University, define and assign their powers and duties, and fix their compensation,

" . . . and such compensation may include payments under, or provisions for, such retirement, disability or death plan or plans as the curators deem proper for persons employed by the university and paid out of any of its public funds for educational services, and the curators may administer such plan or plans under such rules and regulations as they deem proper; . . ." (underlining ours)

It is abundantly clear that the "Missouri Commission on Higher Education" created by Section 173.010, RSMo Cumulative Supplement 1963, is a separate commission of the state, not connected with or a part of the University of Missouri. Therefore, it follows that the Commission's employees, authorized by Section 173.090, RSMo Cumulative Supplement 1963, would not be employees of the University of Missouri. This is further evidenced by the fact the Commission's appropriations are chargeable to the General Revenue of the state under Section 109 of Conference Committee Substitute for House Bill No. 15 of the 72nd General Assembly, and not the funds of the University of Missouri.

Thus, it is our conclusion that the employees of the "Missouri Commission on Higher Education" are not eligible to become members of the University of Missouri Retirement Plan.

However, it does appear that said employees qualify as members of the "Missouri State Employees' Retirement System".

This system comprises Sections 104.310 to 104.550, RSMo 1959. Section 104.310 contains the definitions of terms used in this law. Paragraph 15 defines "employee", and Paragraph 11 defines "department". It is from the provisions of these two definitions that we must determine whether or not the employees of the "Missouri Commission on Higher Education" can qualify under this law and become members of the Missouri State Employees' Retirement System. The pertinent portion of the definition of "employee" is as follows:

"(15) 'Employee', any elective or appointive officer or employee of the state who is employed by a department and earns a salary or wage in a position normally requiring the actual performance by him of duties during not less than one thousand five hundred hours per year, including each member of the general assembly, but not including any employee who is covered under some other retirement or benefit fund to which the state is a contributor, . . ."

The definition of "Department" is as follows:

"(11) 'Department', any department, institution, board, commission, officer, court or any agency of the state government receiving state appropriations including allocated funds from the federal government and having power to certify payrolls authorizing payments of salary or wages against appropriations made by the federal government or the state legislature from any state fund, or against trusts or allocated funds held by the state treasurer;"

There can be no doubt that this Missouri Commission on Higher Education falls within the definition of Section 104.310(11), and its employees meet that of Section 104.310(15). This being so, it is mandatory under Section 104.330, RSMo 1959, that the employees of said Commission become members of the Missouri State Employees' Retirement System at the time of their employment.

CONCLUSION

An employee of the Missouri Commission on Higher Education is not eligible for membership in the University of Missouri Retirement Plan. However, he must become a member of the Missouri State Employees' Retirement System at the time of his employment with the Commission.

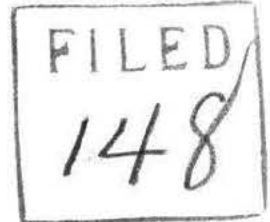
The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

OPINION NO. 148
ANSWERED BY LETTER
(O'Malley)

May 19, 1964



Honorable Ralph H. Duggins
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

This letter of advice is in lieu of a formal opinion requested by your letter of March 26, 1964. A review has been made of the "Graduation Special" life insurance policy to be offered by a regular life insurance company incorporated in Missouri. In reviewing the insurance policy in the light of applicable statutes we have considered the documents you forwarded, consisting of (1) the specimen policy, (2) benefactor contract, (3) newsletter, and (4) application.

We first briefly outline the plan being reviewed. A Missouri regular life company first enters into an agreement with a "benefactor" to pay the first year's premium on individual policies of life insurance on the lives of all members of the senior class of a high school making application therefor, with the benefactor being neither the owner or beneficiary of the policy. Only a parent, guardian or spouse is to be named beneficiary. The graduation policy to be issued to each insured is in the amount of \$5000.00 of whole life insurance coverage, premiums payable to age 60, and non-participating. The second and ensuing year's premiums are to be paid by the insured or the parent if they wish to continue the policy in force, but there is no obligation to do so. The "benefactor" is not named or described, but his motive in providing the first year's coverage is expressed in the following language: "The Benefactor is desirous of encouraging students in his community to complete their education, discourage drop-outs and to focus their attention upon the social and civic benefits of private enterprise, * * *."

We first test the policy against the following rule restated in *Lakin v. Postal Life And Casualty Insurance Company*, Mo. Sup., 316 SW2d 542, 1.c. 549:

"It has uniformly been held that
'A person cannot take out a valid
and enforceable policy of insurance
for his own benefit on the life of
a person in which he has no insurable
interest; such a policy or contract
of insurance is void and unenforceable
on the grounds of public policy, it
being merely a wagering contract; * * *.'
* * * It has repeatedly been stated that
for one to have an insurable interest in
the life of another, 'there must be a
reasonable ground founded upon the
relations of the parties to each other,
either pecuniary or of blood or affinity,
to expect some benefit from or advantage
from the continuance of the life of the
insured'. * * *"

In the case of *McCann v. Metropolitan Life Insurance Company*, 177 Mass. 280, 58 N.E. 1026, we find that one McCann procured from the insurance company a life insurance policy upon the life of Timothy Sullivan, and had Timothy's daughter, Mary Sullivan, named beneficiary. After paying premiums on the policy for a time, McCann delivered the policy to Mary Sullivan. We can say of the "benefactor" in the policy here being reviewed, as was said of McCann at 58 N.E. 1026, 1.c. 1027:

"There is nothing in the case to show
that the plaintiff derived any benefit,
either direct or indirect, from the trans-
action, so that it could be ruled as a
matter of law that the transaction was a
wager, or was other than a gift for the
benefit of Mary Sullivan."

In *Fomby v. World Insurance Company of Omaha*, 115 Fed. Supp. 913, Columbia County, Arkansas, took out a policy of group insurance on its employees against "loss of life, limb,

sight, or time from accidental injuries". In such case the Court observed that it was the intention of Columbia County to "make a gift to or confer a right upon its employee, Robert Fomby or his estate". It was contended that Columbia County did not have an insurable interest in the subject matter of the contract at its inception. In dismissing such contention, the United States District Court spoke as follows at 115 Fed. Supp. 913, 1.c. 921:

"However, these principles are not applicable to this case, because the real beneficiary under the policy is not Columbia County but the estate of Robert Fomby. None of the benefits were intended to and none will inure to the plaintiff, Columbia County. The reasons of public policy for voiding wagering contracts on the life of another do not exist here, and, therefore, it is immaterial whether the plaintiff, Columbia County, had an insurable interest in the life of Fomby. Without question, the deceased, Robert Fomby, had an insurable interest in his own life, as did his wife, and children, and they are the real beneficiaries in this case."

It must reasonably be concluded that the "plan" reviewed does not disclose on its face that the life insurance coverage is predicated on a wagering contract. The face of the documents examined pursuant to your request raised the question of insurable interest on the part of the "benefactor", so we have disposed of such question.

An examination of the policy to be issued to the insured under the "plan" has been made in light of a germane provision found in Section 375.936 RSMo 1959, reading as follows:

"The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance:

* * * * *

"(8) 'Rebates'.

"(a) Except as otherwise expressly provided by law, knowingly permitting or offering to make or making any contract of life insurance, life annuity or accident and health insurance, or agreement as to such contract other than as plainly expressed in the contract issued thereon, or paying or allowing, or giving or offering to pay, allow, or give, directly or indirectly, as inducement to such insurance, or annuity, any rebate of premiums payable on the contract, or any special favor or advantage in the dividends or other benefits thereon, or any valuable consideration or inducement whatever not specified in the contract; * * *."

The initial inducement to accept the "plan" in question is found in the "newsletter" addressed by the insurance company to "Dear Parent, Teacher and Student" informing that the first year's premium on the policy to be continued has been paid by a named person. Such inducement is further reflected on the face of the insurance contract to be issued to the student when the policy date is shown as March 17, 1964, with premiums to be payable commencing on March 17, 1965. In light of such recitals we cannot say that the principal inducement to the continuance of the insurance contract has not been specified in the contract.

Within the scope of tests herein applied to the "plan", you are advised that the insurance policy in question does not contravene Missouri statutes and case decisions.

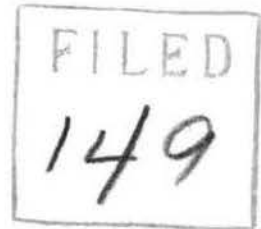
Yours very truly,

THOMAS F. EAGLETON
Attorney General

OFFICERS:
CITY MARSHAL:
CHIEF OF POLICE:
FOURTH-CLASS CITIES:
CITIES, TOWNS and VILLAGES:

In a fourth class city the office of elected marshal is abolished when a chief of police is appointed, the appointment being authorized by ordinance enacted pursuant to a vote of the people under provisions of Section 79.050, RSMo.

April 22, 1964



Honorable Daniel V. O'Brien
Prosecuting Attorney
St. Louis County
214 Manchester Road
Ballwin, Missouri

Dear Mr. O'Brien:

This is in response to your request of March 25th for an opinion. Your request enclosed a letter from the Honorable Walter H. Smith, Mayor of Ballwin, Missouri.

Two questions were posed: The City of Ballwin, a city of the fourth class, has a city marshal, who was elected under Section 79.050, RSMo 1959, as amended in 1961 (Cum. Supp. 1963). This statute, relating to elective officers for cities of the fourth class, in relevant parts provides:

"The following officers shall be elected by the qualified voters of the city, and shall hold office for the term of two years and until their successors are elected and qualified, to wit: Mayor and board of aldermen. The board of aldermen may provide by ordinance, after the approval of a majority of the voters voting at an election at which the issue is submitted, * * * for the appointment of a chief of police, who shall perform all duties required of the marshal by law, and any other police officers found by the board of aldermen to be necessary for the good government of the city. If the board of aldermen does not provide for the appointment of a chief of police * * * as provided by this section, a city marshal * * * shall be elected, and the board of aldermen may provide by ordinance that the same person may be elected marshal and collector, at the same election, and hold both offices * * *."

Honorable Daniel V. O'Brien

It is our understanding that the proposition providing for the appointment of a chief of police has been approved by the voters in a recent election. The present city marshal was elected in April 1963 for a term which expires in April 1965.

The question is--When a chief of police is appointed, is the elected office of marshal abolished immediately or does the incumbent marshal serve out the remainder of the term to which he was elected?

To resolve your question we must first determine whether power exists to shorten the term of an elected officer, and second, whether that has been done under the present circumstances.

The statute provides for an elected marshal in the event the chief of police is not appointed, their duties being identical, it is not contemplated that the city have both.

Under the terms of the statute, the board of aldermen may pass an ordinance providing for a chief of police, this after proper approval by the voters. The law is universal that the Legislature, having provided for the election of a city marshal, may also provide for his removal during his term of office and provide for his being supplanted in this case by the appointment of a chief of police.

The Legislature passed Section 79.050 and thus created the office of marshal as an elective office. The right and power of the Legislature to do so cannot be doubted. Can the Legislature, then abolish the office during an elected officers' term. The authorities are settled that it can.

The case of State v. Hedrick, Mo. Sup., 241 S.W. 2d 402, 1.c. 418, holds:

"It is also held in several decisions that if the Legislature is empowered to create an office, it may provide for removal from that office as it wills.
* * *

In Lanza v. Wagner (N.Y.), 183 N.E. 2d 670, the Legislature passed a law, reorganizing the school board and

Honorable Daniel V. O'Brien

providing for the establishment of another board, which act in effect removed the incumbent board members before the expiration of their term. It was claimed that to shorten the term or to abolish the office was an invasion of the board members' constitutional rights. The court held at l.c. 673:

"We may quickly dispose of the attack upon the statute on the score of its having shortened the plaintiffs' terms of office. The office held by each of the plaintiffs was concededly created by the Legislature, not by the Constitution, and there is no constitutional inhibition against the mere shortening of the term of an existing statutory office by legislation aimed at the office rather than at its incumbent. * * * (Omitting cases cited.) * * * Public offices are created for the benefit of the public, and not granted for the benefit of the incumbent, and the office holder has no contractual, vested or property right in the office. (Long v. Mayor of City of N. Y., 81 N.Y. 425, 427-428, supra.) Absent any express constitutional limitation, the Legislature has full and unquestionable power to abolish an office of its creation or to modify its term, or other incidents attending it, in the public interest, even though the effect may be to curtail an incumbent's unexpired term. * * *"

In Long v. Mayor, etc., of City of New York, 81 N.Y.R. 425, the plaintiff was elected an alderman for a two-year term. He served only five months being superseded by another alderman elected under a law passed by the State Legislature which took effect immediately. Here the court said, l.c. 427:

" * * * It is claimed that the act in question shortens the duration of the plaintiff's term of office, so that the term declared by statute, in force when

Honorable Daniel V. O'Brien

he was elected, to be for 'two years,' is made, by the act of 1870, a term for five months. We see no legal objection thereto. The office was not created by, or regulated in any manner by, the Constitution. The legislature had entire control over the matter. The office was created, its term was fixed by that body, and it could be changed by it. * * *

In 67 C.J.S., "Officers," Section 10, it is stated:

"The governmental authority which possesses the power to create an office has, in the absence of some provision of law passed by a higher authority, the implied power to abolish such office, or to consolidate two or more offices which it has created. Thus, in the absence of constitutional restriction, an office created by the legislature can be abolished by it. * * *

In Perkins v. Board of Commissioners (Ill.), 111 N.E. 580, 1.c. 585, the court said:

"The law is now well settled in this State that, when the Legislature creates an office, such office is wholly within the power of the Legislature creating it, and it may prescribe the powers and duties of the incumbent of such office and the manner of filling the office, and may, from time to time, change the manner or mode by which such office shall be filled."

42 Am. Jur. 904, "Officers":

"The power to create an office generally includes the power to modify or abolish it. * * * where the office is of legislative creation, the legislature may, unless prohibited by the Constitution, control, modify, or abolish it whenever such course

Honorable Daniel V. O'Brien

may seem necessary, expedient or conducive to the public good. The power extends to the consolidation of offices, resulting in abolishing one and attaching its powers and duties to another."

It has also been held that an officer appointed or elected for a specific term may be supplanted during that term as there is no breach of a contractual relationship. In *Dodge v. Board of Education*, 302 U.S. 74, 82 L. Ed. 57, it was held that an act of the State Legislature fixing the term or tenure of a public officer creates no contractual obligation which may be impaired by subsequent legislation.

The Legislature having power to abolish an office that it has created, certainly has power to designate how a transfer of the duties of that office can be accomplished.

The Legislature, having created an office, has the power to abolish it. The implementation used is immaterial. In Section 79.050 the Legislature has expressly empowered the city council with the approval of the voters, to substitute the office of an appointed chief of police for that of an elected marshal.

We can find no constitutional restriction against this procedure, and consequently, we hold that the office of marshal is abolished upon the appointment of a chief of police who may take office immediately.

CONCLUSION

Section 79.050, RSMo 1959, as amended in 1961 relating to elective officers in cities of the fourth class, authorizes a proposition to be submitted to the voters providing for the appointment of a chief of police and upon approval of the proposition, the board of aldermen may provide by ordinance for the appointment of a chief of police.

The chief of police, upon appointment, may take office

Honorable Daniel V. O'Brien

immediately, and then the office of marshal ceases to exist, even though the term to which the marshal was elected has not expired.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

June 22, 1964



Mr. James T. Riley
Prosecuting Attorney
Cole County
Jefferson City, Missouri

Dear Mr. Riley:

You have requested advice from this office concerning application of the provisions of Section 546.615, RSMo 1959, dealing with the allowance of "jail time" as credit upon criminal sentences.

Specifically, you ask three questions about a hypothetical felon committed to the Department of Corrections who has been awarded forty-five days credit upon a two year sentence.

- A. When is the time to be credited;
- B. Is the sentence to be considered one for one year ten and one-half months;
- C. Since the minimum sentence to the penitentiary is two years may jail time be credited on a two year sentence?

The pertinent statute, Section 546.615, RSMo 1959, contains both mandatory and discretionary "jail time" credit provisions, i.e., time spent in jail after sentencing and before delivery to the Department of Corrections must be credited upon the sentence; time spent in jail before sentencing may be credited upon the sentence in the discretion of the judge imposing the sentence.

The sheriff delivering a convict to the Department of Corrections is required to endorse upon the commitment papers, the number of days the convict spent in jail after sentencing. He must also endorse the number of days the convict spent in jail before sentencing if the sentencing court has so ordered, Section 546.615.3, RSMo 1959.

As explained in a prior opinion of this office (to The Honorable James D. Carter, May 6, 1960 - copy enclosed herewith), the actual crediting of the time is ministerial only and may be enforced by appropriate court action.

Nevertheless, because the exact number of days involved will not be known before the sheriff delivers the convict to the Department of Corrections, the crediting cannot take place until that time and, therefore, that is the time that it must be done.

The allowance of "jail time" is not a matter of grace (as is, for instance, time off for donating blood which is awarded under the Governor's power to commute), but is the product of a mandatory directive of the legislature as pertains to time spent in jail after sentencing and of the sentencing court (where it chooses to exercise its discretion), under authority of the legislature as pertains to time spent in jail before sentencing.

In any event, an institution of the Department of Corrections receiving a convict has no alternative but to credit the "jail time" properly awarded and endorsed by the sheriff delivering him into its custody. Moreover, it must be kept in mind that Section 546.615.2, RSMo 1959, directs that "jail time" credit is to be calculated in addition to any remission of sentence under Section 216.355, RSMo 1959, by virtue of serving three-fourths of the time assessed without infraction of institution rules.

Therefore, in answer to question A, "jail time" credit must be applied on receipt of the prisoner in custody and in calculating the prisoner's discharge date (either full time or under the "three-fourths rule"), he is, for all practical purposes, to be regarded, on the day of admission, as if he had already been in the custody of the Department of Corrections for the number of "jail time" days endorsed on the commitment papers by the sheriff.

The application of "jail time" credit by the very terms of the law which establishes it, does not constitute a reduction in the sentence. The statute directs that, where applicable, the time spent in jail ". . . shall be calculated as part of the sentence imposed." This indicates that "jail time" is to be regarded as time already spent serving the sentence and not as a reduction thereof.

Mr. James T. Riley

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The answer to question B, then, is that a forty-five day credit for "jail time" does not have the effect of reducing a two year sentence to one of one year ten and one-half months.

It does not mean that a prisoner will serve less than a two year sentence merely because he will not have to spend twenty-four months in the actual custody of an institution of the Department of Corrections when "jail time" credit is applied to his sentence. What it does mean is that he serves part of his sentence in jail and part of his sentence in the custody of the Department of Corrections.

A two year sentence is a two year sentence whether "jail time" is credited or not and thus, in response to question C, the allowance thereof is not in conflict with the two year minimum provision of Section 546.490, RSMo 1959.

Our studied opinion is that an institution of the Department of Corrections must credit "jail time" to a prisoner's sentence at the time he is received in custody. "Jail time", properly awarded, must be applied to a two year sentence notwithstanding the minimum provision of Section 546.490, RSMo 1959.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

HLM: kcd
Encl.

April 17, 1964

Opinion No. 153
Answered by Letter
(Eichhorst)

Mr. William A. McDonnell
Acting Chairman
Division of Commerce and
Industrial Development
Jefferson Building
Jefferson City, Missouri



Dear Mr. McDonnell:

This is in answer to your request for an opinion of this office which reads in part as follows:

" * * * our Commission is requested to approve the issuance of general obligation bonds by the City of Poplar Bluff, Missouri, for the purpose of financing the construction of an industrial type building for which there is as yet no lessee. We wish to request a ruling by the Attorney General as to whether or not our Commission, aside from the wisdom of a bond issue under such circumstances, has the legal authority to approve such a project."

The Missouri Industrial Development Project Law is found at Sections 71.790 - 71.850, RSMo Cum. Supp. 1963. The most pertinent sections to your inquiry are Sections 71.807 and 71.810, RSMo Cum. Supp. 1963. They are:

71.807. "The division of commerce and industrial development shall promptly examine the application and make such investigation thereof as it deems necessary. The division shall approve the project when it finds that the project:

"(1) Will further the economic development of, and employment in, the municipality and the state;

"(2) Will further the general welfare of the municipality and the state; and

"(3) Is economically feasible and will not become a burden to the taxpayers of the municipality."

71.810. "The division of commerce and industrial development shall notify the municipality submitting the plan of its approval or disapproval of the plan. The division may approve the plan subject to such conditions as it may deem necessary to assure that the project will meet the requirements of section 71.807 and the municipality submitting the plan shall incorporate the conditions in carrying out the project."

These two sections grant to the Division the authority to approve - fully or conditionally - or to disapprove a submitted proposal. If the Division, in its discretion, believes that the provisions of Section 71.807, RSMo Cum. Supp. 1963 are met, then the project should be approved. Of course, the Division should not approve a submitted proposal unless it is the finding of the Division, in its discretion, that the project would further the economic development and general welfare of the municipality and state and be economically feasible.

There is no provision in the statute that requires, as a condition precedent to approval, that the proposal have a firm lessee. Hence, there is no legal reason why the Division does not have the power or authority to approve the proposal. However, I should think that the fact that there is no firm lessee would weigh heavily on the question of economic feasibility and could easily be the deciding factor as to whether the bonds would become a burden on the taxpayers. This ground alone could be sufficient reason to deny approval of the project. The burden of discretion imposed upon the Division is a heavy one and may on occasion require the Division to deny proposed

Mr. William A. McDonnell

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April 17, 1964

projects and thus protect a municipality against its own folly. The Division as experts in this field must carefully weigh all the factors and exercise its own judgment in applying the yardsticks spelled out in these statutes.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

TEE:hm

CORPORATION: A stock business corporation may not provide by its articles of incorporation for the distribution of its assets upon dissolution to organizations of a charitable or tax-exempt nature.

Opinion No. 154

July 27, 1964



Honorable Warren E. Hearnese
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Mr. Hearnese:

Your request for an opinion of the Attorney General dated April 2, 1964, poses the question of whether an amendment to the Articles of Incorporation of a stock business corporation is valid which provides for the distribution of its assets upon termination to organizations of a charitable or tax-exempt type described in Section 501(c)(3) of the Internal Revenue Code of the United States.

The corporation involved, Eden Publishing House of St. Louis, was incorporated under Chapter 42, Articles I and VIII, RSMo 1889. Those sections were revised under the new corporation code in Chapter 351 of RSMo 1959. By virtue of Section 351.690, RSMo 1959, which provides in part: "(4) All of the provisions of this law to the extent therein provided shall apply to all other corporations, existing under prior general laws of this state and not specifically mentioned in subdivisions (1), (2) and (3) of this section", the corporation is subject to the new code.

Section 351.085 of the new code authorizes a corporation to amend its articles of incorporation in any respect as may be desired, by resolution of the board of directors and an assenting vote of a majority of the outstanding shares entitled to vote, "provided, that its articles of incorporation as amended contain only such provisions as might be lawfully contained in original articles of incorporation if made at the time of the amendment".

Honorable Warren E. Hearnes

Section 351.055(9) states that articles of incorporation may contain "any . . . provisions, not inconsistent with law, which the incorporators may choose to insert". The question here involved is whether the proposed amendment is consistent with law.

Sections 351.470, 351.490 and 351.525, RSMo 1959, provide for the disposition of the assets of stock corporations upon dissolution. These sections cover both voluntary and involuntary dissolution, and provide that after paying or adequately providing for the payment of all obligations, the remainder of the assets of a corporation shall be distributed among the stockholders according to their respective rights and interests. The proposed amendment purports to distribute upon dissolution any remaining assets to organizations described in Section 501(c)(3) of the Internal Revenue Code. Such a disposition would violate the above cited statutes, and be contrary to the public policy of the state therein declared which is to distribute any remaining assets among the shareholders of the corporation on a pro rata basis.

CONCLUSION

It is the opinion of this office that the proposed amendment to the Articles of Incorporation of Eden Publishing House, which provides that in the event of termination, dissolution or winding up of the corporation, its remaining assets shall be distributed only to one or more organizations described in 501(c)(3) of the Internal Revenue Code, does not conform to the law of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Donald L. Randolph.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

CONSERVATION COMMISSION:
COUNTY CLERKS:
SALARIES AND FEES:

Section 51.150, RSMo Supp. 1963, requires the county clerk to file a certified list of all salaries and nonaccountable fees received by each elected county official by virtue of his office. County Clerks are not required to include service fees received for distributing hunting, fishing, trapping and replacement permits in this list as a county clerk does not receive these fees by virtue of his office.

OPINION NO. 155

May 18, 1964

Honorable James W. Williams
State Representative
2010 North Fourth Street
St. Joseph, Missouri

Honorable J. T. Campbell
State Representative
Faucett, Missouri

Gentlemen:

This is in answer to your request for an opinion of this office which reads as follows:

"Respecting Section 51.150 passed by the last Legislature which requires the reporting of salary and fees, I would like an opinion as to whether or not this includes all salary and all fees of all officers. Also whether fees for sale of hunting and fishing licenses are included as fees within this statute."

Section 51.150, RSMo Supp. 1963, sets out the duties of the clerk of the county court. The 1963 Legislature amended this section by adding paragraphs (5) and (6) which require the county clerk:

"(5) To compile and keep a list of all salaries and nonaccountable fees received by each elected county official by virtue of his office for each calendar year. The source of each fee shall be itemized, the amount of mileage allowance received shall be reported, and the total fees less expenses shall be shown. Each elected official shall certify and give the necessary information on his office to the clerk of the county court;



"(6) To file a certified list of all salaries and nonaccountable fees received by each elected county official by virtue of his office for the preceding calendar year before March first with the secretary of state."

In answer to your first question the statute makes no exception to the requirement that all salaries and nonaccountable fees received by each elected county official by virtue of his office should be reported. If you have any questions concerning specific salaries or fees other than those received from the sale of hunting and fishing licenses, we will be glad to consider them.

Regarding your second question, the distribution of hunting, fishing, trapping and replacement permits are regulated by the Rules and Regulations of the Conservation Commission, promulgated under Article IV, Sections 40(a) - 41, Constitution of Missouri, 1945, and Section 252.020(1), RSMo 1959.

Rule 2.25 reads as follows:

"A. The clerks of each country (sic) court of all counties with less than 200,000 population are appointed as distributing agents for hunting, fishing, trapping and replacement permits for the Conservation Commission. Each distributing agent shall appoint sub-agents as the Commission may require to aid in distribution of permits, and the Commission will designate additional distributing agents under the same conditions and requirements as apply to the county clerks.

"Each distributing agent shall enter into a bond provided by the Commission and payable to the State of Missouri in a sum to be fixed by the Commission. The bond shall fix the county, city or areas the distributing agent is to serve, and shall be conditioned that he will faithfully perform the duties delegated to him and shall accept, receipt for and remit to the Conservation Commission at the close of each month, all monies derived from the distribution of such permits, less and except the service fee of twenty-five (25) cents.

"B. The total service fee charged for the issuance of any one permit shall not exceed twenty-five (25) cents, which is in addition to the permit fee fixed herein. The charging or collecting by any distributing agent or person of any fees in excess of those stated herein is unauthorized and prohibited.

"C. A replacement for a lost, destroyed or mutilated hunting, fishing or trapping permit may be issued only by the distributing agent who issued the original permit, upon payment of twenty-five (25) cents plus a service fee of twenty-five (25) cents.

"D. Commercial and miscellaneous permits and replacements therefor may be issued only through the Commission office at Jefferson City upon receipt of proper application and the required permit fee. No service fee is required for such permits, but a fee of twenty-five (25) cents is required for a replacement permit."

In counties of less than 200,000 population, the clerk of the county court is appointed as distributing agent and collects a service fee for issuing the permits. The county clerk is an elected county official, Section 51.020, and the service fee is a nonaccountable fee within the meaning of Section 51.150 (5) and (6). Inasmuch as the duty of the county clerk to distribute permits and collect fees therefor is not prescribed by statute but by a regulation of the Conservation Commission, there arises the question, does the county clerk receive these fees by virtue of his office. We think the answer to this question must be no. The distribution of hunting and fishing permits is not one of the official duties of the county clerk. He is individually appointed by the Conservation Commission and may decline this appointment if he so desires. This was the holding in *Walsh v. County of St. Louis, Mo.*, 353 SW2d 779, in which the court said, 1.c. 785:

"* * * One accepting the appointment as such distributing agent in a given area acts in his individual capacity and not in his official capacity if he is also

the county clerk. Plaintiff became the agent of the Commission for selling and issuing its licenses or permits and performed a service in another and distinct department of the public service than that of County Clerk of St. Louis County.* * *

It is our opinion that the service fees received by a county clerk for distributing permits for hunting, fishing, trapping and replacement permits are not fees received by virtue of his office. Therefore, the county clerk is not required to include these fees in the certified list required by Section 51.150 (5) and (6).

There are two counties in this State with a population of 200,000 or more, Jackson and St. Louis. The City of St. Louis is included in St. Louis County. The Commission has its own offices in each county and an employee of the Commission is in charge of distributing permits therein. He also works through sub-agents who charge the twenty-five cent service fee and retain the usual ten cents. However, the employee is salaried and all service fees not retained by the sub-agents are returned to the Commission and held in a special fund. The requirements of Section 51.150 (5) and (6), do not cover these fees as they are not received by an elected county official.


CONCLUSION

Section 51.150, RSMo Supp. 1963, requires the county clerk to file a certified list of all salaries and nonaccountable fees received by each elected county official by virtue of his office.

County clerks are not required to include service fees received for distributing hunting, fishing, trapping and replacement permits in this list as a county clerk does not receive these fees by virtue of his office.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

Opinion No. 156

Answered by letter

May 13, 1964

FILED

156

Honorable Francis Toohay, Jr.
Prosecuting Attorney
Perry County
Perryville, Missouri

Dear Mr. Toohay:

This letter is in response to your request of April 2, 1964 for an official opinion of this office. You inquire:

"If a student attends a physical education class one period per day five days a week during the school year, is the local school required to give a student one-fourth unit of credit or one-half unit of credit? If the answer to the first question is that they are required to give one-half unit of credit, is it sufficient for graduation if the student attains one-half credit in one year, as indicated in question one, and one-fourth credit in two additional years. Would these requirements be sufficient for the student to graduate?"

You refer us to the School Administrator's Handbook, 1961, Publication No. 20-H of the State Department of Education. The minimum requirements for high school graduation as determined by the State Board of Education are set out at pages 113-114. A total of 17 units is required. As to physical education the requirement reads:

"A minimum of one unit of credit should be earned by all high school pupils. One-fourth unit per year is allowed for physical education classes which meet two times per week and one-half unit of credit is allowed for physical education classes which meet four or five times per week.

May 13, 1964

"Of the total of seventeen units for graduation, no more than one unit may be in physical education."

These requirements are created by the State Board of Education pursuant to statutes authorizing the Board to formulate rules governing accreditation of school work and to secure courses in physical education.

Section 160.090 (2), RSMo 1959, provides in part:

"The state board of education shall:

• • • • •

"(3) Classify the public schools of the state, subject to such limitation as may hereafter be provided by law, establish requirements for the schools of each class, formulate rules governing the inspection and accreditation of schools preparatory to classification, and such accredited school work shall be given full credit in requirements for entrance to and classification in any educational institution supported in whole or in part by state appropriation."

Section 163.250, RSMo 1959, provides:

"The state board of education shall have authority and it shall be the duty of said board:

"(1) To adopt and promulgate such rules and regulations as it may deem necessary to secure courses in physical education to all pupils and students in all public schools and in all educational institutions supported in whole or in part by the state;
• • •"

The power and duty to define accreditation of physical education courses is prescribed by these statutes as a matter solely within the jurisdiction of the State Board of Education.

Honorable Francis Toohy, Jr.

-3-

May 13, 1964

Therefore, this office has no authority to make judgments as to the accreditation of high school courses.

We have discussed accreditation requirements with the Department of Education and they inform us as follows: The high school credit requirements established by the Board are minimum requirements. A high school student is required to have one unit of physical education for graduation. In order to receive one-fourth unit he must attend for a school year a class which meets at least twice a week. In order to receive one-half unit he must attend for a school year a class which meets at least four times a week. The required one unit may be earned by any combination of quarter or half units. That is, the high school student may earn the required one unit of physical education over a two, a three, or a four year period.

I hope this information will be sufficient to answer the questions before you. If more detailed information is required, we refer you to the State Department of Education.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

LCD/dg

cc: Department of Education
Attn: Delmar Cobble

April 22, 1964



Honorable John B. Mitchell
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri

Dear Mr. Mitchell:

This is in answer to your recent letter in which you pose several questions regarding ten general obligation bonds that were issued by the County of Buchanan, which were dated March 15, 1938, and which matured January 15, 1949. Your questions are as follows:

- "1. May an action be maintained at this time for the collection of the principal of these bonds and interest coupons attached in view of the provisions of Section 516.110 R.S.Mo. 1949, or any other Statute of Limitations?
- "2. If such an action has been barred by the Statute of Limitations, may the County Court, or the Prosecuting Attorney, or any other County officer waive the Statute of Limitations as a defense to such an action, and authorize the payment of said principal and interest?
- "3. If an action is brought to collect said principal and interest, is it discretionary, on the part of either the County Court, or the Prosecuting Attorney, as to whether or not the Statute of Limitations should be set up as a defense to such an action?

Honorable John B. Mitchell

"4. If said principal and interest may now be paid, out of what funds may such payment be made, in the absence of any provision in this year's County Budget for such payment?

"5. Did the inclusion of items in the County Budget for 1961 and 1962 designated as a reserve for unpaid obligations amount to an acknowledgment or promise to pay these bonds, within the meaning of Section 516.320 R.S.Mo. 1949, so that the Statute of Limitations is no longer a bar or defense to an action brought for their collection?

"6. Assuming that the Statute of Limitations is now a bar to an action for the collection of said bonds and interest, would the individual members of the County Court be subject to the penalties provided in Section 558.260 if they, as members of the County Court, voted in favor of making an order by the County Court having the purpose and effect of authorizing and procuring the payment of said bonds and coupons?"

In answer to your first three questions, we are enclosing an official opinion rendered by the Attorney General under date of September 13, 1954, to Rex A. Henson. You will note that the opinion holds that a public body does not have discretion to waive the statute of limitations running in favor of the public. It is, therefore, our view that an action cannot be maintained at this time to collect the principal and interest on such bonds when the ten-year statute of limitations expired in 1959.

It is further our view, as pointed out in the enclosed opinion, that public officials do not have discretion to determine whether the statute of limitations shall be waived, but are bound as a part of their public duties to interpose the statute of limitations in defense, if the holders of such bonds file suit to collect for such bonds.

In view of the above holding, it is unnecessary to answer question number four.

Honorable John B. Mitchell

You state that in the county budgets for 1961 and 1962, there was set aside the sum of Ten Thousand Dollars as "a reserve for unliquidated obligations" but state that such obligations were not further or otherwise identified, and you ask whether such budgetary designation would constitute an acknowledgment or promise which would make the statute of limitations inapplicable under the provisions of Section 516.320, RSMo, which provides that in actions founded on contract no acknowledgment or promise shall be evidence of a new or continuing contract which will take the case out of the operation of the statute of limitations unless the acknowledgment or promise be in writing, subscribed by the party chargeable thereby.

It is our view that the designation in the county budget for the years involved would not be a promise or acknowledgment in writing which is required by Section 516.320.

In the case of Green v. Boothe, 188 S.W. 2d 84, the Kansas City Court of Appeals, in quoting from Corpus Juris, said at l.c. 88:

" * * * A part payment to be effectual to interrupt the statute must be voluntary on account of the debt in suit, and free from any uncertainty as to the identification of the debt on which it is made, and in this behalf it is said that no distinction can be made on principle between a written acknowledgment and part payment.
* * *

(Second emphasis ours.)

It can be seen that the written acknowledgment or promise must be clear and specific as to the identification of the alleged debt upon which the new or continuing contract is to be based. We believe it to be evident that a mere reference to "reserve for unpaid obligations" is not a clear, distinct, unequivocal and certain identification of the ten bonds about which you inquire.

Your question assumes that the county court has the right, power and authority, after the statute of limitations has run, to revive an obligation which has been barred by limitation. This underlying assumption would appear to be incorrect in view of our holding that the county court is obligated to interpose the

Honorable John B. Mitchell

defense of the statute of limitations in all cases in which the statute has run. However, it is unnecessary to rule this issue, inasmuch as there has been no acknowledgment or promise in writing subscribed by the party chargeable insofar as payment of the ten bonds in question is concerned.

Question number six inquires whether the members of the county court would be subject to the penalties provided in Section 558.260 if they directed by order of the court the payment of such bonds out of county funds. It is our view that a court might well hold that the members of the county court who vote for the payment from county funds of such bonds would be subject to the penalties provided in such section. It might well be that such a payment would be held to be for a purpose not directed and warranted by law, and, therefore, illegal and such as would come within the provisions of Section 558.260. Even if a court held that the provisions of Section 558.260 are not applicable in the present situation, the Supreme Court of Missouri has nevertheless held that public officials may be personally liable for illegal expenditures they authorize, and that the prosecuting attorney may bring an action to recover from such officials such illegal expenditures. State To Use of Consolidated School District No. 42, Scott County, v. Powell, 221 S.W. 2d 508.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CBB/fh
Enclosure

Ans. by letter

April 7, 1964

Honorable James G. Lauderdale
Prosecuting Attorney
Lafayette County
County Courthouse
Lexington, Missouri



Dear Mr. Lauderdale:

This will reply to your request concerning the propriety of certain deductions made by the Office of the Comptroller from criminal cost bills, partial copies of which were enclosed with your request. We will answer your letter by using the item numbers as they appear on the printed form of the cost bill:

Item 10: We have concluded that when a defendant pleads not guilty, an issue of fact is joined, irrespective of whether such plea is subsequently withdrawn. Hence, the 25¢ fee allowed for an issue of fact joined should be allowed in each case in which a plea of not guilty is entered. However, we add that we can find no statutory authority for Item 9 of the Bill of Costs, so that the 15¢ fee there specified should not be allowed under this item.

Item 18: In our opinion, only one fee may be allowed for entering judgment, inasmuch as there is only one judgment when a defendant is sentenced. It is, of course, true that the law provides for terms of court for both Lexington and Higginsville. However, we do not find any statute under which it is mandatory for the clerk to enter a copy of the judgment not only in the court in which it was rendered, but in the other court as well. Inasmuch as statutes which provide for fees are to be strictly construed, in the absence of any specific statutory requirement for a duplicate entry of a judgment, it is our opinion that only one fee may be charged for entering such judgment.

Item 30: It is our opinion that a fee may be charged for only one copy of the judgment and sentence for the use of the sheriff. This item has reference to the use of the judgment for official purposes in connection with the commitment of the prisoner. Even if the sheriff requires another copy in order to

April 7, 1964

collect his fee, there is no basis in the statute for charging either the State or the defendant the cost thereof. With respect to the number of words, the only legal charge which may be made is the charge of 10¢ per 100 words. Hence, an allowance of \$1.00 for a copy of the judgment and sentence would appear to this office to be adequate, absent any proof that the judgment and sentence in the particular case exceed 1,000 words, which is very unlikely.

Item 31: For the same reasons stated with respect to Item 30, only one charge may be made for certificate and seal to the copy of the judgment and sentence. Hence, the charge for a duplicate certificate and seal should not be allowed.

Item 33: Although the meaning of the reference in this item to "after allowance" is not clear, we have concluded that a fee may properly be allowed for two copies of the bill of costs at the rate of 10¢ per 100 words. However, inasmuch as the ordinary bill of costs does not exceed more than 500 words (and usually contains less than that number), an allowance of \$1.00 for the two copies would appear to be adequate in the absence of proof that the bill of costs actually contains more than 500 words. In determining the number of words in the bill of costs, none of the words on any numbered line of the printed form should be counted unless fees are chargeable with respect to the item of costs there listed. The printed form is used only for the convenience of all parties, and necessarily includes a number of items which are not chargeable in every case. It is also to be noted that under the statute the fee for Item 33 includes certificate and seal, which means that no charge may be made for the certificate and seal on the copies of the cost bill.

We trust that the foregoing will be sufficient to provide a guide for the circuit clerk in preparing future bills of costs.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

By
Joseph Nessenfeld
Assistant Attorney General

JN:hm

cc: Mr. Bud Renn
Office of the Comptroller and
Budget Director

SCHOOLS:
BALLOTS:
COUNTY BOARD OF EDUCATION:
ELECTIONS:

A qualified voter has the right to cast a write-in ballot in the election under Section 165.657(4), RSMo 1963 Supp., of members of the county board of education of second, third, and fourth class counties, and that such ballots, if otherwise proper, must be counted for the persons written thereon.

July 16, 1964

Opinion No. 162

FILED

162

Honorable Robert B. Paden
Prosecuting Attorney
DeKalb County
Maysville, Missouri

Dear Mr. Paden:

This opinion is issued in response to your request of April 8, 1964, for an official opinion of this office. You inquire whether write-in ballots can be legally cast and counted in the election of members of the county board of education of second, third, and fourth class counties.

Section 165.657 (4), RSMo 1963 Supp., provides:

"There is created in each second, third and fourth class county in this state a county board of education whose members shall be elected by popular vote at the annual school election held on the first Tuesday in April in each year. Each member shall be a citizen of the United States and of the state of Missouri, a resident householder of the county, and shall be not less than twenty-four years of age. Nominations for board members shall be filed with the secretary of the county board of education at least thirty days before the election. The county board of education shall prepare ballots and publish notice for such election in the same manner as for boards of education in school districts."

[Note: After July 1, 1965, Section 165.657(4) will be renumbered as Section 162.111 (1).]

Honorable Robert B. Paden

We think the recent case of Kasten v. Guth, Mo., 375 SW2d 110, and the early case of Bowers v. Smith, 111 Mo. 45 are directly in point.

The appellant in Kasten v. Guth, supra, was a write-in candidate for county superintendent of schools. The respondent contended that appellant was not eligible to be voted for at the election because he had not filed a declaration of candidacy as required by Section 167.020, RSMo 1959. This statute provides that persons desiring to be a candidate for county superintendent must file a written declaration of candidacy forty-five days before the election. The trial court sustained respondents motion to dismiss. The Supreme Court reversed stating that there was no express provision that no person should be voted for whose name does not appear upon the printed ballot and that construction of Section 167.020 as such a statutory prohibition would be against the established public policy of this state. The court further stated such a statutory prohibition might be unconstitutional. The court held that Section 167.020 does not restrict the voters choice to the candidates printed on the ballot but the voter may vote for a person of his own selection by the write-in method.

This same argument raised under the county superintendent election statute in Kasten was raised under the general election laws in Bowers v. Smith, supra. Under the Australian Ballot Law as enacted in Missouri only those candidates who comply with the nominating process are entitled to have their name printed on the official ballot. Laws 1889, p. 108 § 17; Section 111.420, RSMo 1959. There is no express provision limiting the voter's choice to the names printed on the ballot. The Supreme Court said in Bowers 1.c. 52:

"By our constitution general elections are held at certain fixed dates, and the right of suffrage is expressly secured to every citizen possessing the requisite qualifications. The new ballot law cannot properly be construed to abridge the right of voters to name their public servants at such elections, or to limit the range of choice (for constitutional offices) to persons nominated in the modes prescribed by it. Nominations under it entitle the

Honorable Robert B. Paden

nominees to places upon the official ballots, printed at public expense; but the Missouri voter is still at liberty to write on his ballot other names than those which may be printed there."

The statute which we are here considering, Section 165.657(4), also provides that nominations shall be filed thirty days before the election. Also there is no express provision restricting the voter's choice to the candidates on the printed ballot. Since the relevant provisions of Section 165.657(4) are parallel to the statutes considered in Kasten and Bowers, supra, we reach the same conclusion; namely, that the nomination provided by Section 165.657(4) is not a condition precedent to election and members of county boards of education of second, third, and fourth class counties may be voted for by the write-in method.

Subparagraph 2 of Section 111.580(1), RSMo 1959, sets forth the procedure for preparing a write-in ballot in general elections. Your letter notes the possible line of reasoning that since Section 111.580 does not apply to school elections (Section 111.625), then write-in ballots cannot be cast in the election of the county board of education. This reasoning has been frequently considered by those concerned with school elections, however, it is fallacious. This argument was unsuccessfully advanced by the respondent's brief in Kasten v. Guth, supra.

Section 111.580 merely defines the method of preparing a write-in ballot in certain elections. The source of the right to cast a write-in ballot is not Section 111.580 nor any other statute. The applicability or inapplicability of Section 111.580 to an election, indeed the total non-existence of Section 111.580 would in no way affect the existence of this right. The general election statutes considered in Bowers v. Smith, supra, did not contain any write-in procedure comparable to Section 111.580. See: Laws 1889, p. 105 et seq. § 25. The sole effect of the inapplicability of Section 111.580 is that the method of preparation of write-in ballots in such elections is not controlled by the provisions of that statute.

We are of the opinion that in Missouri the right to write one's choice upon his ballot is fundamental to government by majority will. This right is reflected in our public policy, exists without statutory implementation and indeed may exist in the face of an attempted statutory prohibition.

Honorable Robert B. Paden

Historically, ballots prepared by the voter's hand predate use of ballots printed at public expense. Prior to the Australian Ballot System all ballots were, in a manner of speaking, "write-in" ballots. Nance v. Kearbey, Mo., 158 S.W. 629, 632.

It is significant that in both the Bowers and Kasten cases the Supreme Court assumed the existence of the right to write one's choice of candidates on the ballot and approached the issues from the point of view of whether this right was abrogated by the statutes in question. Holding that the statute did not restrict this right the court said in Kasten, l.c. 114:

"Any other conclusion would attribute to the legislature an intent contrary to our established public policy to the effect that a qualified voter be permitted to vote for any person of his choice and that the will of a majority of the voters should prevail."


We are of the opinion that the voter's right to freely choose elected public officials by writing upon his ballot the person of his own selection applies to popular elections of county board of education members.

CONCLUSION

Therefore, it is the opinion of this office that a qualified voter has the right to cast a write-in ballot in the election under Section 165.657(4), RSMo 1963 Supp., for members of the county board of education of second, third, and fourth class counties, and that such ballots, if otherwise proper, must be counted for the persons written thereon.

The foregoing opinion, which I hereby approve, was prepared by my assistant Louis C. DeFeo, Jr.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

OPINION NO. 164

April 16, 1964



Honorable Ralph H. Duggins
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

Receipt is acknowledged of your letter of April 9, 1964, submitting to this office an executed copy of Declaration of Intention of original incorporators of the proposed Ozark National Life Insurance Company, including a copy of the Articles of Incorporation of such corporation, to be formed under the provisions of Chapter 376 RSMo 1959, as amended. Also forwarded with your request for an opinion concerning the documents heretofore referred to was proof of publication of the same as required by Section 376.070 RSMo 1959.

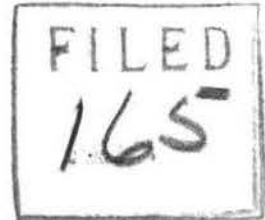
An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070 RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with the provisions of Sections 376.010 to 376.670 RSMo 1959, as amended, and not inconsistent with the Constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

July 21, 1964



Honorable Frank Bild
Missouri Representative
13th District
9234 Gravois
St. Louis 23, Missouri

Dear Mr. Bild:

In your request for an opinion dated April 10, 1964, you inquire whether it is lawful for a member of the board of directors of a school district having six members on its board to work on the job as a journeyman plumber for a master plumber who has a subcontract to do the plumbing work in the building of a new school building for the school district. You also indicate that the contracts for the construction work were let on the basis of public bids and were awarded to the lowest bidder.

Previous opinions of this office, in fuling on questions somewhat similar to the one you have submitted, have based their rulings on the public policy of the state as enunciated by our appellate courts. We enclose herewith copies of the following opinions for your convenience:

Opinion dated September 24, 1937 to Honorable Edward T. Eversole, Prosecuting Attorney of Jefferson County.

Opinion dated June 30, 1948, to Honorable Fred C. Bollow, Prosecuting Attorney of Shelby County.

Opinion dated May 15, 1953, to Honorable James T. Riley, Prosecuting Attorney of Cole County.

July 21, 1964

The substance of the opinions and the authorities which they cite is that a school board member is not permitted to have any direct or indirect pecuniary interest in the contracts entered into or made by the school board. The opinion to Bollo enunciated the rule that "the policy of our law is to remove from public officials all temptations to use their official power, directly or indirectly, for their own private gain or advancement". That opinion cites the case State of Missouri ex rel Smith vs. Bowman, 184 Mo. App. 549, where the court states "Certainly the trend and policy of our law in this respect is to remove from public officials, so far as possible, all temptation to use that official power, directly or indirectly, to increase the emoluments of such office; and so they are forbidden to become interested in contracts let by them, * * *".

Clearly direct employment is prohibited under these rules. The problem here presented, however, really is whether an employee of a subcontractor, which employee is a school board member, has an "indirect" interest in the contract. Neither the opinions enclosed nor the case cited, present this precise question. The difficult problem is how indirect or remote the interest of the director may be to present an unacceptable conflict. By way of example, would there be an unacceptable conflict if a laborer who dug part of a ditch for a sewer line or a truck driver for a lumber company which delivered some materials to the job site violate the state public policy.

Each case must be decided upon its own facts and no generalizations can be made as to what is an "indirect" conflict of interest except when applied to the facts of each case.

It, therefore, seems to me that the plumber here or his employer should not be denied the right to work on the job because of the remote interest of the journeyman plumber in the contract. However, a situation could arise involving acceptance of the work on the ground of alleged faulty material or the workmanship of the plumber involved, in which event, the director should not participate in the acceptance of the work. It could be also, under the facts,

Honorable Frank Bild

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July 21, 1964

that the plumber is in active charge or supervision of the work, in which case, he should not participate as a director in the acceptance of the work and possibly could be considered as having a direct interest in the contract.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

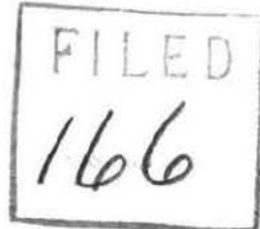
By J. Gordon Siddens
Assistant Attorney General

JGS:cs

SCHOOL BUSES: Re: Licensing of school buses under Section
301.060 (9), RSMo
SCHOOLS:

Opinion No. 166
Answered by letter.

April 21, 1964



Honorable Charles A. Weber
Prosecuting Attorney
Ste. Genevieve, Missouri

Dear Mr. Weber:

This letter is in response to your request of April 13, 1964, for an official opinion of this office. You inquire:

"The school buses in Ste. Genevieve County are operated by an individual, under contract with the various school districts and he operates the same with school buses licenses.

"The owner of the buses has been contacted by the Junior College at Flat River, Missouri, with a proposition of hauling students to the Junior College from Ste. Genevieve. The question involved is whether the owner of the buses could transport the students to the Junior College on the school bus license under which the buses are licensed."

We understand the facts to be: The bus is privately owned and licensed under Section 301.060 (9), RSMo 1963 Supp. The bus is presently contracted to transport students to public schools. The State Department of Education informs us that the Flat River Junior College is a public school.

Since buses owned by school districts are licensed without fee under Section 301.060, RSMo 1959, it is apparent that privately owned school buses are to be licensed under Section 301.060 (9), if otherwise qualified. Section 301.060 (9), RSMo 1963 Supp., provides that the license fee for a school bus shall be \$25.00, a fee substantially lower than that imposed on other transportation vehicles. Section 301.010, RSMo 1959, defines the terms used in Chapter 301. The term, "school bus", is there defined in subsection (23).

April 21, 1964

"School bus", any motor vehicle used solely to transport students to or from school or to transport students to or from any place for educational purposes;"

Any bus within the above definition would be properly licensed at the school bus fee of Section 301.060 (9).

The term, "school bus", is also defined in Section 390.020 (13), RSMo 1959.

"The term 'school bus' means any motor vehicle while being used solely to transport students to or from school or to transport students to or from any place for educational purposes."

This office has previously interpreted the definition stated in Section 390.020 (13). In an opinion dated September 19, 1953, addressed to Honorable Jay White (copy enclosed herewith), this office held that a privately owned bus used solely for the purpose of transporting school children to or from schools, whether public or private is within the definition of Section 390.020 (13). The definitions of Sections 301.010 (23) and 390.020 (13) are substantially identical. We are of the opinion that the definition of "school bus" of Section 301.010 (23) contemplates buses used for students of either public or private schools or both.

In summary, a privately owned bus used solely to transport students to or from school, whether public or private, may be licensed as a school bus under Section 301.060 (9), RSMo 1963 Supp. Elementary schools, high schools, junior colleges, colleges and universities are schools under Section 301.060 (9). Therefore, buses used to transport students to Flat River Junior College and to other schools of the various school districts are to be licensed under Section 301.060 (9).

Very truly yours,

THOMAS F. EAGLETON
Attorney General

Enclosure 1

LCD/cg

INSURANCE: Articles of Incorporation of the proposed Covenant Security Insurance Company are legally insufficient, and require amendment before certification under Section 379.040, RSMo 1959

Opinion No. 170

May 14, 1964



Honorable Ralph H. Duggins
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

This opinion is in answer to your inquiry of April 10, 1964 by which you submitted for examination and certification under Section 379.040, RSMo 1959 an executed copy of Declaration of Intention, including Articles of Incorporation, of original incorporators of the proposed Covenant Security Insurance Company.

The proposed company's basic law of incorporation is found at Sections 379.010 to 379.160, RSMo 1959, as amended. In designating the specific kind or kinds of business to be conducted, Article III of the proposed Articles of Incorporation provides:

"The corporation is empowered and authorized to make contracts of insurance, or to reinsure, or accept reinsurance on any portion thereof, of the following kinds of insurance:

"a. Insurance on horses, cattle, and other live stock against loss or damage by accident, theft, disease, or death or any other such unknown contingent event;

"b. Insurance upon the health of individuals, and against personal injury, disablement, or death, resulting from traveling or general accident by land or water and to insure the fidelity of persons holding places of public or private trust, and also to receive on deposit and insure

the safekeeping of books, papers, monies, stocks, bonds, and on [all] other kinds of personal property, and to do any and all other kinds of legitimate insurance business, excepting that of life insurance and dealing in annuities and excepting also the kinds of insurance included in the first subdivision or class named in Sub-section 1 of Section 379.010, Revised Statutes of Missouri, 1959, as amended."

Language found at "a" and "b", quoted above from Article III of the proposed Articles of Incorporation, discloses that incorporators seek to take powers and organize under both subdivisions (2) and (3) of subsection 1 of Section 379.010, RSMo 1959, as amended. To such disclosed purpose we direct the following language from subdivision 1 and subsection (3) of Section 379.010, RSMo 1959, as amended:

"1. Any number of persons, not less than thirteen in number, a majority of whom shall be citizens of this state, may associate and form an incorporation, association or company for the following purposes, to wit:

* * * * *

(3) * * and excepting also the kinds of insurance included in the first and second subdivisions or classes named in this subsection."

Taking powers authorized under both subdivisions (2) and (3) of subsection 1 of Section 379.010, RSMo 1959 would be authorized only upon compliance with the following language from subdivision (1) of subsection 2 of Section 379.010, RSMo 1959, as amended, reading in part, as follows:

"2. (1) No company shall be organized under more than one of the subdivisions hereof; * * * provided, however, that any stock company which has a fully paid capital of not less than four hundred thousand dollars and a surplus of at least four hundred thousand dollars * * * may commence to make insurance on all three classes of insurance enumerated in this section by amending its charter to provide such powers or by including such powers in its charter if it be a new company; * * *."

Article IV of the Articles of Incorporation of the proposed Covenant Security Insurance Company discloses that the company will be organized with a paid-up capital stock of \$200,000.00 and a paid-in surplus of \$250,000.00. Consequently, under the directives quoted above from subdivision (3) of subsection 1 of Section 379.010, RSMo 1959, as amended, and from subdivision (1) of subsection 2 of such statute last mentioned, it must be concluded that Articles of Incorporation of the proposed Covenant Security Insurance Company herein reviewed are found not to be in accordance with the provisions of Sections 379.010 to 379.160, RSMo 1959, as amended, and are therefore inconsistent with the laws of this State. The deficiencies noted in the Articles of Incorporation treated herein are such as to require amendment by original incorporators to conform to the suggestions made herein. When such amendments have been accomplished this office will issue a certificate under Section 379.040, RSMo 1959 without requiring republication of the Declaration of Intention.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO/dg

April 24, 1964

Opinion No. 172 Answered by Letter
(Eichhorst)

Mr. William E. Siebert
Assistant Industrial Director
Division of Commerce and
Industrial Development
8th Floor, Jefferson Building
Jefferson City, Missouri

Dear Mr. Siebert:

This is in answer to your recent request for an opinion of this office as to whether or not a bond issue may be issued by a city under the Industrial Development Bonding Law where the bond issue would involve the purchase of an existing plant from the Industrial Development Corporation and an expansion or extension thereof.

Words having a specific meaning within the context of the Industrial Development Bonding Law (Sections 71.790 to 71.850, RSMo Cum. Supp. 1963) are defined in Section 71.790, RSMo Cum. Supp. 1963. Subdivision 5 of that Section reads as follows:

"(5) 'Project for industrial development' or 'project', the purchase, construction, extension and improvement of industrial plants, including the real estate either within or without the limits of such municipalities, buildings, fixtures, and machinery; except that any project of a municipality having fewer than eight hundred inhabitants shall be located wholly within the limits of the municipality."

Therefore, from the above definition, it is clear that a "project" may include both the purchase of an existing plant and the extension thereof. General obligation bonds may be

Mr. William E. Siebert

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April 24, 1964

issued for a project by any municipality located in a county having a population of 400,000 or less, as provided for by Section 71.817, RSMo Cum. Supp. 1963. Revenue bonds may be issued for a project by any municipality, as provided for by Section 71.820, RSMo Cum. Supp. 1963. Thus, a bond issue can be issued for such a development where the project and issuance have been approved as required by Sections 71.790 to 71.850, RSMo Cum. Supp. 1963.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

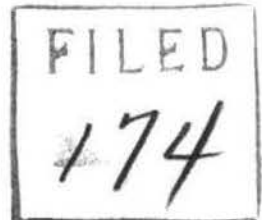
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LEVEE DISTRICTS:
LEVEE DISTRICT SUPERVISORS:
TAXATION:

The supervisors of a circuit court levee district have authority under Section 245.175 to levy an additional tax for organizational purposes if the total levies do not exceed one dollar per acre.

May 15, 1964

OPINION NO. 174



Honorable Bill Crigler
State Representative
Howard County
402 West Morrison
Fayette, Missouri

Dear Mr. Crigler:

Your letter which we received April 21, 1964, asks for an opinion on the following question:

"May the Board of Supervisors of such a levee district, having once levied a 25¢ organizational tax, proceed to levy an additional organizational tax to provide funds for the purposes mentioned in Section 245.175, provided that the total of such organizational tax levies does not exceed the present maximum limitation of \$1 per acre upon each acre of land and each mile of right-of-way of all public service corporations within such district?"

You state that a levee district was organized in 1951 under the provisions of Sections 245.010 to 245.280 of the Missouri Statutes, and that the duly elected board of supervisors of such district levied an organizational tax in the amount of twenty-five cents under Section 245.175, RSMo 1959.

You further state that the tax funds realized under this levy were expended and exhausted in making payment of organizational expenses.

You do not state when this levy was made but we assume that it was shortly after the organization in 1951, and we also assume that the levee district is not within the limits of a city. You state that it is necessary to raise additional funds to complete the organizational work and in order to obtain Federal moneys now available.

Honorable Bill Crigler

Section 245.175, RSMo 1959, is a part of Chapter 245, entitled "Levee Districts". This section provides in part:

"The board of supervisors of any levee district organized under * * * (this chapter) shall levy a uniform tax of not more than one dollar per acre * * * to be used for the purpose of paying expenses incurred * * * in organizing said district, making surveys of the same and assessing benefits and damages and to pay other expenses necessarily to be incurred * * *."

It further provides that this preliminary work shall be done before the board may proceed under Section 245.180, which section provides for the levy of taxes to pay for the cost of the improvements. The Legislature, by this statute, intended to provide a method of raising funds for this important preliminary work.

The right to levy more than one tax for organizational purposes (within the maximal limits) has been approved in the case of State ex rel Hotchkiss v. Lemay Ferry Sewer District of St. Louis County, 92 SW2d 704. This was a case involving sections of the statutes governing sewer districts, but those sections are very similar to the sections under discussion here. The Court said at l.c. 706:

"As heretofore seen, section 11037 fixes the maximum levy which can be made for the purpose of paying preliminary expenses incurred and to be incurred at 10 cents per 100 square feet, but it does not require that the maximum of 10 cents per square be levied in the first instance. The Legislature knew that fact. If a district should levy less than the maximum limit of 10 cents, then incur expenses in excess of the levy made, but within the authorized limit of 10 cents, such deficiency should be paid because incurred within the limit authorized. * * *"
(Emphasis ours.)

As pointed out, this case specifically states that there was no requirement to levy the maximum tax in the first instance and in the event the first levy is less than the maximum, then another levy can be made as long as the sum total is within the maximum, which is the precise question here.

Honorable Bill Crigler

The case of McCord v. Missouri Crooked River Backwater Levee District of Ray County, 295 SW2d 42, 1.c. 45, holds that Chapter 245 is a "code within itself". It further provides:

"* * * The entire legislative act must be considered together and all provisions must be harmonized, if reasonably possible, and every word, clause, sentence, and section of an act must be given some meaning unless it is in conflict with the legislative intent. * * *"

To insure a liberal construction of Sections 245.010 to 245.280 relating to circuit court levee districts, the Legislature included Section 245.280, which section reads in part:

"* * * Sections 245.010 to 245.280 are hereby declared to be remedial in character and purpose, and shall be liberally construed by the courts in carrying out this legislative intent and purpose * * *."

Thus, the Legislature has stressed the fact that it is their intent that these sections be liberally construed for the specific purpose of carrying out the provisions of the Circuit Court Levee District Law.

Therefore, when it becomes necessary for a board of supervisors of a duly organized circuit court levee district to incur additional expenses in organizing the district for the purposes specified in Section 245.175, RSMo 1959, an additional tax levy is authorized provided the total levies do not exceed the authorized one dollar per acre.

CONCLUSION

It is the opinion of this office that the board of supervisors of a circuit court levee district may levy an additional tax where required for organizational and other purposes as authorized by Section 245.175, RSMo 1959, in order to provide for the preliminary survey and to pay for the expenses incurred or to be incurred; provided further, that said tax and the one previously levied do not total more than one dollar per acre as set forth in Section 245.175.

Honorable Bill Crigler

The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

INSURANCE: Articles of Incorporation of Great Missouri Life
Insurance Company.

Opinion No. 177

April 24, 1964



Honorable Ralph H. Duggins
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

This opinion is in answer to your letter of April 21, 1964, with which you submitted to this office an executed copy of Declaration of Intention, including Articles of Incorporation, of original incorporators of the proposed Great Missouri Life Insurance Company. Also forwarded with your request for an opinion concerning the documents referred to was proof of publication of the same as required by Section 376.070 RSMo 1959.

An examination of the documents referred to in the preceding paragraph of this letter has been made as required by Section 376.070 RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Sections 376.010 to 376.670 RSMo 1959, as amended, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO/dg

Opinion No. 180 Ans. by Letter
(Nessenfeld)

June 8, 1964



Honorable William G. Johnson
Prosecuting Attorney, Morgan County
Heineman Building
Versailles, Missouri

Dear Mr. Johnson:

This is in answer to your request for the opinion of this office with respect to certain questions which have arisen in your county in connection with the deposit of county funds.

You ask whether the county court has the sole power to designate the depositaries and the amounts to be deposited in each if there are more than one. In our opinion, based upon a review of Sections 110.130, et seq., RSMo, the county court is vested with the sole power to designate county depositaries and to determine the amounts to be deposited in each such depositary if there are more than one.

Putting to a side the provisions of Section 110.030, RSMo, it is to be noted that Section 110.130, RSMo, provides for the county court to receive proposals from banks which desire to be selected as depositaries of the county funds.

Section 110.140, RSMo, prescribes the procedure for bidders to follow, including the delivery of the proposal to the clerk of the county court.

Section 110.150 provides for opening the bids by the county court.

Section 110.170 provides that "As soon as the required security is given and approved, the court shall make an order designating the successful bidders as depositaries."

Honorable William G. Johnson

Section 110.180 provides that if there are no proposals from banks in the county, "the county court may deposit the funds of the county" with one or more banks in the county or adjoining counties in sums and for the period of time the court deems desirable.

Section 110.190, RSMo, provides that when the funds are deposited with two or more banks under the provisions of Section 110.180, the county court shall select one of such banks to act as a clearing house for the others.

Section 110.200, RSMo, provides that if the total bids do not include the whole of the county funds, the county court may follow the procedure therein prescribed.

Section 110.210, RSMo, provides that if no selection of a depository is made at the time affixed by the applicable statutes, the county court may at a subsequent time select a depository or depositories.

Section 110.250, RSMo, provides that if the county court deems it necessary, it may require a depository to provide additional security and in the event of a failure to do so, "the county court may proceed to select another depository in lieu thereof."

The foregoing provisions, which of course are not set forth or even summarized in their totality, can mean only that the county court is the sole authority which has the power to select depositories.

Section 110.030, RSMo, does not in any way affect the sole authority of the county court to select depositories. Its sole purpose is to eliminate the necessity for advertising for bids so long as it is unlawful for depository banks and trust companies to pay interest upon demand deposits. The latter portion of this section makes clear that the obligation to select the depository or depositories is still vested in the county court by providing that if it is unlawful for depository banks and trust companies to pay interest on demand deposits, "the award or awards of such funds shall be made in each case, without bids and without requiring the payment of any bonus or interest, by the authority or authorities which are by statute empowered to make the awards of such funds upon bids."

Honorable William G. Johnson

The statutes above cited designate the county court as the authority empowered to make the awards of county funds upon bids, and such authority remains unimpaired by the fact that advertisements for bids and the taking of bids are presently suspended.

You further ask whether the safekeeping receipts for United States Government securities which have been deposited in disinterested banking institutions or safe depositaries as trustees to secure the deposit of public funds in the designated depositaries should be held by or subject to the control of the county court. You state that at present the depositaries have pledged the safekeeping receipts to the county treasurer and that when such securities are exchanged, increased, or decreased, it is done with the approval of the treasurer as pledgor, evidently without obtaining the approval of the county court.

Section 110.010, RSMo, to which you refer, requires that securities of the character prescribed by Section 30.270, RSMo, secure the funds which are deposited in the legal depositary. Paragraph 2 of that section gives an option to the depositary bank to deliver the securities themselves to the fiscal officer or the governing body of the depositor of the funds or to deposit such securities with a disinterested banking institution or safe depositary "as trustee satisfactory to both parties to the depositary agreement". Paragraph 3 of that section provides in part that the rights and duties of the parties to the depositary contract shall be the same as those of the state and the depositary banks respectively under Section 30.270.

As applied to deposits of county funds, the parties to the depositary agreement can only be the depositary bank on the one hand and the county, acting through the county court, on the other hand. This section does not specifically provide for a safekeeping receipt, as such, in the event the depositary bank exercises the option, as is customary, to deposit the securities with a disinterested bank as trustee. Obviously, there should be some form of receipt whereby the trustee bank or safe depositary assures to the county that the securities have in fact been deposited therewith.

Honorable William G. Johnson

Paragraph 3 of Section 110.010 further provides that in the event the securities are deposited with the trustee then, if the municipal corporation "or other depositor of funds" notifies the trustee in writing that there has been a breach of the depositary contract and makes written demand on the trustee for the securities or any part thereof, it is the duty of the trustee to forthwith surrender "to the municipal corporation or other depositor of funds" a sufficient amount of the securities to protect the depositor from loss. The word "depositor" as used in this statute has reference, insofar as applicable to your question, to the county which is the owner of the funds on deposit and not to the official who deposits those funds as the statutory agent of the county. The word "depositor" is used in the same sense as the words "municipal corporation", particularly in view of the word "other", which emphasizes the fact that it is the public body or political subdivision which is the actual depositor of funds within the meaning of the statute.

It is to be noted that Section 110.260, RSMo, provides in part that the county treasurer shall not be responsible for any loss of the county funds through the negligence or failure of any depositary, and that aside from his own misconduct or misappropriation of the funds, the selection of a depositary and the deposit of the funds therein has the effect of releasing the treasurer from loss thereof. This section further emphasizes the fact that the county treasurer has no control over the depositary or the securities given by such depositary to secure the deposit of funds therein.

Moreover, Section 110.250, RSMo, above noted, specifically empowers the county court when it deems it necessary for the protection of the county to require any depositary to provide additional security. Again, the county treasurer has no function to perform in this connection.

It is our opinion, upon a reading of the statutes as a whole, that the securities and, when deposited with the trustee, the safekeeping receipts therefor, are subject to the sole control of the county court as the agent of the county and not to the control of the county treasurer. Hence, in the event it becomes necessary to exchange, increase, or decrease the amount

Honorable William G. Johnson

of the securities pledged, this may be done only with the approval of the county court rather than the county treasurer. In the event of a breach of the depositary agreement, the notice provided for in Section 110.010 is to be given by the county, acting through the authority of the county court, and the surrender of the securities provided for therein may be made only to the county rather than to the county treasurer.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN:lt

July 15, 1964



Honorable William E. Seay
Prosecuting Attorney
509 North Main
Salem, Missouri

Dear Mr. Seay:

This is in response to your letter of May 2, 1964, respecting the validity of the action of R-4 School District of Dent County in rehiring the Superintendent and increasing his salary at a regular meeting of the directors on a vote of 3 to 2 in favor of the action.

If is our view, as it is apparently yours, that the re-employment by three affirmative at the same salary is valid under Section 163.090(3), RSMo. 1963, because it provides that failure to terminate a teacher constitutes automatic re-employment.

It is further our view that the re-employment of a teacher at an increased salary requires a majority of the whole board (4 affirmative votes) because it is a contract to be let under Section 165.320.

Yours very truly

THOMAS F. EAGLETON
Attorney General

May 5, 1964



R. A. Michael, D. O.
218 Jackson Street
Jefferson City, Missouri

Dear Dr. Michael:

This is in response to your inquiry as to whether the Missouri State Flag may be flown from a flagpole in front of the Charles E. Still Osteopathic Hospital.

We believe that, subject to traditional standards of respect and protocol, the flag of this state may be flown in the same manner and under the same circumstances as the flag of the United States. We are of the further opinion that this is a practice which is not only permissible but one which should be encouraged.

The foregoing is said in the knowledge that an opinion issued by this office to the Honorable Walter H. Toberman under date of February 23, 1956, holds that the Secretary of State may not grant permission for the use of the flag to particular persons or corporations. (A copy of that opinion is attached herewith.) That opinion is bottomed on two principals: (1) a lack of statutory authority on the part of the Secretary of State to grant (or, for that matter, to deny) permission for the use of the flag under any circumstances; (2) public interest in the state flag prohibits its use for private purposes. Neither of these principals applies in the instant situation.

We certainly recognize that circumstances surrounding the use of the flag could make the use grossly improper. For example, it would certainly violate the public interest in the flag if a reproduction of it were used as part of a trademark or in connection with private advertising endeavors. However,

R. A. Michael, D. O.

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May 5, 1964

to display the flag from a flagpole in the same manner as the flag of our country is to express respect for it and for the State of Missouri.

Consequently, we believe that, just as any person or corporation may fly the United States flag, so may the Missouri State Flag be flown by anyone so long as it is displayed under conditions consistent with the respect due it.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:lt
Enclosure

CRIMINAL LAW:
CRIMINAL PROCEDURE:
MAGISTRATES:
MAGISTRATE COURT:
PRELIMINARY EXAMINATION:
SUPREME COURT RULES:

Person charged with felony may be bound over after preliminary examination for appearance at some specific time sooner than the first day of the next term of circuit court. A criminal case may be tried at the discretion of the court having jurisdiction if the defendant is given a reasonable time to prepare his case.

OPINION NO. 185

May 22, 1964

Honorable John B. Mitchell
Prosecuting Attorney
Buchanan County
St. Joseph, Missouri



Dear Mr. Mitchell:

This is in response to your opinion request of May 1, 1964, which reads as follows:

"It has long been the habit of Magistrates upon certifying a felony case to the Circuit Court to bind the defendant over to the next term of Circuit Court, however, Rule 23.08 states in part as follows:

'...if it appear that a felony has been committed and that there is probable cause to believe the accused guilty, the Magistrate shall hold the accused to answer in the court having jurisdiction of the offense. ...'

"Rule 23.11 states:

'Upon the completion of preliminary examination, if the defendant be bound over to answer a felony charge, all papers in connection with the hearing shall be certified by the Magistrate or the Clerk to the Clerk of the Court in which the offense is cognizable, within ten days; unless the Court shall sooner convene, in which event the Magistrate shall so certify on or before the day set for the court to convene.'

"Rule 32.05 (b) states in part as follows:

Honorable John B. Mitchell

'If a person ... is bound over to answer the charge upon which he has been granted a preliminary examination or as to which he has waived such examination he will appear in the court in which an indictment may be filed or an injunction filed against him at a stipulated time, and from time to time as required by the court, to answer the charge. ...'

"May the Magistrate stipulate some time other than the first day of the next term of court as the time for appearance of a defendant who gives bail bond after being bound over for trial to the Circuit Court in a felony case even if the defendant objects?

"If the answer to the above question is in the affirmative, may that date be set on a day certain sooner than the first day of the next term of Circuit Court even if the defendant objects?

"May the matter be tried in the Circuit Court sooner than the next term of that court even if the defendant objects?"

The only specific provision made by statute regarding the time at which a defendant can be brought to trial is Section 545.810, RSMo 1959, requiring that a defendant be given a reasonable time to plead. This section provides:

"The defendant in an indictment or information in a court of record, shall not be required to plead thereto until he shall have had a reasonable time in which to examine the same and to prepare his pleadings."

Article I, Section 18 (a), Constitution of Missouri, 1945, insures the right of a defendant to a speedy public trial and states:

"That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the

Honorable John B. Mitchell

accusation; to meet the witnesses against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county."

Rule 32.05(c), Rules of Criminal Procedure, provides for admission to bail of a person bound over to the Circuit Court after a preliminary hearing:

"(c) If a person is admitted to bail after he has been bound over to answer a charge, or after an indictment has been found or an information filed against him, the condition of his bond shall be that he will appear in the court in which an indictment or information has been or may be found or filed against him, at a stipulated time and from time to time as required by the court, to answer the charge; that he will submit himself to the orders, judgment, sentence and process of the court having jurisdiction to try such offense, either originally or upon change of venue; and that he will not depart without leave."

Section 544.450, RSMo 1959, makes this provision for admitting such persons to bail:

"If the offense with which the prisoner is charged be bailable, and the prisoner offer sufficient bail, a recognizance shall be taken for his appearance to answer the charge before the court in which the same is cognizable, on the first day of the next term thereof, and from day to day, and term to term thereafter, and to abide sentence and judgment therein, and not to depart such court without leave, and thereupon he shall be discharged."

There appears to be a discrepancy between those two provisions, in that the Supreme Court Rule makes the condition of the bond that the defendant will appear at a stipulated time, and from time to time as required by the Court, whereas Section 544.450, supra, makes the condition of the bond that

Honorable John B. Mitchell

the defendant appear on the first day of the next term of the Court before which the charge is cognizable and from day to day, and term to term thereafter.

The Supreme Court of Missouri is given rule-making power by the Constitution of Missouri, 1945, Article V, Section 5:

"The supreme court may establish rules of practice and procedure for all courts. The rules shall not change substantive rights, or the law relating to evidence, the oral examination of witnesses, juries, the right of trial by jury, or the right of appeal. The court shall publish the rules and fix the day on which they take effect, but no rule shall take effect before six months after its publication. Any rule may be annulled or amended by a law limited to the purpose."

Thus, by this constitutional authority the Supreme Court may promulgate rules of practice and procedure which vary from rules of practice and procedure previously established by the Legislature.

Section 544.450 originally appeared in the Missouri Revised Statutes of 1825. It has thereafter remained in our statutes, and was last amended in 1931. However, our Missouri Constitution, which permits our Supreme Court to establish rules of practice and procedure for our state courts under Article V, Section 5, became effective on March 30, 1945. Thereafter, in pursuance of this constitutional authority, Supreme Court Rule 32.05(c) was adopted on April 14, 1952, and became effective on January 1, 1953.

Since the time at which a bail bond is returnable is clearly procedural, and Supreme Court Rule 32.05(c) was promulgated subsequent to Section 544.450, and by virtue of the 1945 Constitutional authority, said Supreme Court Rule must prevail.

Therefore, the return date of a bail bond should be as specified in Supreme Court Rule 32.05(c).

Honorable John B. Mitchell

It is our understanding of your letter that you are primarily interested in determining whether a defendant may be brought to trial sooner than the first day of the next term of Court as set forth in Section 544.450. This section was enacted for the purpose of providing a method for admitting persons to bail, and not for the purpose of setting the time at which the trial should be held. That this section does not necessarily determine the time at which a person may be brought to trial, is made clear by State v. Bryant, 356 Mo. 1223, 205 S.W. 2d 732. In this case, decided by the Supreme Court of Missouri in 1947, the defendant complained, on appeal, that the trial court erred in forcing defendant to trial when the cause was not returnable until the May Term. The Court declared this contention without substance, saying, l.c. 734:

"* * * Criminal cases are not returnable to particular terms of court, as civil cases were under our former code, so there can be nothing in that portion of defendant's assignment. * * *"

Thus, a trial may be set at any time, having a regard for the defendant's right to a speedy trial and to a reasonable time to prepare his case. What is a reasonable time must, of course, be determined upon the factual situation of each case.

CONCLUSION

(1) Under Supreme Court Rule 32.05(c), which has precedence over Section 544.450, RSMo 1959, a Magistrate may stipulate some time other and sooner than the first day of the next term of circuit court as the time for appearance of a defendant who gives bail bond after being bound over for trial to the circuit court in a felony case even though defendant objects.

(2) A criminal case may be tried at any time within the discretion of the court having jurisdiction over it with regard, however, for the defendant's right to a speedy trial and a reasonable time within which to prepare his case.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

June 1, 1964



Honorable Haskell Holman
State Auditor
Jefferson City, Missouri

Dear Mr. Holman:

This is in answer to your letter of recent date in which you inquire regarding opinions rendered under date of November 14, 1933, and March 12, 1934, which held that county collectors are not entitled to collect from the county compensation for indexing the tax books in the collector's office.

You inquire whether the rulings in such opinions are applicable when a deputy county collector or other individual indexes such tax books. It is our view that the opinions are applicable in such a situation, and that the county is not authorized to expend county funds for such purpose. The holding in both opinions is bottomed upon the fact that the index is only for the convenience of the county collector, and that the county is unauthorized to expend county funds for such purpose. It follows, therefore, that the county does not have authority to make payments to a deputy county collector or to anyone else for performing such service.

You further inquire regarding an opinion dated May 14, 1934, which was withdrawn April 14, 1964. The 1934 opinion held that an assessor may be compensated by the county for indexing assessment books while acting in an individual rather than an official capacity. Your question is as to the applicable date on which compensation received by the assessor for indexing the assessment books should not be allowed. It is our view that April 14, 1964, is the effective date after which no compensation

Page Two
Honorable Haskell Holman
June 1, 1964

should be allowed to an assessor for indexing the assessment books. It is our view that assessors were legally paid for such work prior to April 14, 1964, in view of the 1934 opinion of the Attorney General. We so rule because we believe it to be equitable in the circumstances. We believe that the long reliance of the Auditor's office and assessors on the 1934 opinion justifies the payment by county courts to assessors for the performance of such services prior to April 14, 1964.

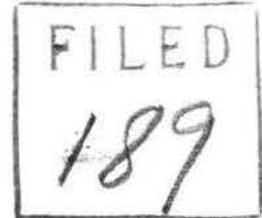
This is a ruling only on this specific opinion and on the date of the withdrawal thereof insofar as it affects payments made before such withdrawal date, and does not purport to rule or make any holding as to the effect of the withdrawal of any other opinion by the Attorney General in the past or in the future.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CBB/fh

July 8, 1964



Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri

Dear Mr. Burrell:

You have requested the opinion of this office with respect to two questions which have arisen as the result of the revocation of the parole of a defendant who had partially served his jail sentence.

Your first question is whether the expenses of the sheriff of Greene County in making a trip to Jefferson City to serve a capias warrant for the arrest of the defendant charged with violating the terms of his parole are recoverable as costs. Costs are purely statutory, and statutes in relation thereto are strictly construed. We are aware of no statute which makes such expenses as you mention part of the taxable costs of the case. Therefore, since no items may be taxed as costs in the absence of statutory authority, it is our opinion that such expenses may not be taxed as costs.

Your second question is whether a new commitment is necessary in order to authorize the sheriff to hold the defendant in jail after his parole has been set aside. We answer this question in the negative. When a defendant receives a jail sentence, the commitment is simply a transcript of the entry of the judgment of conviction and of the sentence thereupon, duly certified by the clerk. See Supreme Court Rule 27.12 and Section 546.600, RSMo, from which the rule was derived. A somewhat similar rule (27.13) relates to penitentiary sentences. With respect to the latter rule and the prior statute, our Supreme Court has expressly held

Honorable Don E. Burrell

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that a commitment is simply a certified copy of a judgment and sentence. State v. Harrison, Mo. Sup., 276 SW2d 222, and Williford v. Stewart, 355 Mo. 715, 198 SW2d 12, 15.

Rule 27.12, which is applicable to your question, provides that the certified document therein provided for shall be sufficient authority to the sheriff to execute the sentence. When a parole is set aside, the original commitment is thereby restored and constitutes sufficient authority for the sheriff to hold the defendant in accordance therewith. Of course, the court has authority under Section 549.101, RSMo Cum. Supp. 1963, paragraph 1, to allow the defendant credit for all or part of the time the defendant was on parole.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JN:lt

INCOME TAX:
TAXATION:
DEPRECIATION:
RULES AND REGULATIONS:

Director of Revenue cannot promulgate rule allowing depreciation in amount greater than original cost price of item.

OPINION NO. 191

October 5, 1964



Honorable M. E. Morris
Director of Revenue
State of Missouri
Jefferson City, Missouri

Dear Mr. Morris:

This is in answer to your opinion request dated May 6, 1964. Your request reads as follows:

"On November 30, 1962, Missouri Income Tax Regulation M.R. 140 was rescinded and a new regulation adopted. A photograph of the regulation changes is enclosed, with a copy of the law and regulations in effect in 1962.

"The 1964 U. S. Revenue Act, Section 203 amending Code Sections 48 and 1245 provides that on the first day of the taxpayer's first taxable year beginning after December 31, 1963, the basis of depreciable property must be increased by the amount of the credit previously taken under the investment credit act of 1962.

"Examples of depreciation schedules are attached. Please note example #3 where \$700 was allowed as additional depreciation in 1962 under revised regulation of November 30, 1962. Following the same procedure as federal, this

Honorable M. E. Morris

\$700 will be added to the depreciation schedule, and will over the life of the asset be allowed again as depreciation. This will result in an allowance of \$700 over the cost of the asset.

"Please review Section 143.160, 143.190, and 143.200 of the Missouri Income Tax Law, and advise whether or not the state can accept an adjustment of the depreciation base for state income tax purposes on the same basis as the federal adjustment, or must the state collect tax on the additional allowance taken in prior years?"

Section 143.200, RSMo 1959, empowers the Director of Revenue to prescribe reasonable rules and regulations for the administration of the income tax laws and also states such rules and regulations shall follow as nearly as practicable the rules and regulations prescribed by the United States Government on income tax and collections. However, the Director of Revenue is not authorized to promulgate rules and regulations contrary to a state statute.

The question you wish answered arises because the Federal Income Tax Law provides for a seven percent investment credit for certain new investments. When the Federal statute was first passed, it was provided that the investment credit be deducted from the cost price to arrive at the base upon which depreciation was calculated. When this was done, the taxpayers requested the Missouri Department of Revenue to take some action which would let the taxpayers use the same depreciation figures in both the Federal and State returns. The Missouri department did this by giving an additional first year of depreciation allowance equal to the investment credit under the Federal law. However, the Federal statute has now been amended so as to provide that the base upon which depreciation is calculated instead of being the cost price less the investment credit will be the cost price. The taxpayers have now requested the Missouri department to amend its regulation so that the same figures for depreciation can be used in the State and Federal returns. It can be seen from this that if the Missouri regulations were so amended, there would be a total

Honorable M. E. Morris

depreciation greater than the actual cost of the item, that is, greater by an amount equal to the first year additional depreciation that was allowed to make the depreciation figures of the State and Federal returns the same.

Section 143.160, RSMo, provides for the deductions that may be taken by taxpayers. Subsection (2) provides in part as follows:

"(a) Losses actually sustained during the year incurred in a taxpayer's business or trade, including reasonable allowance for exhaustion, depreciation, obsolescence, wear and tear of property in the business or trade, * * *"

(Emphasis supplied.)

Depreciation, to be "reasonable", cannot under such statute exceed the original cost of an item. If, therefore, a rule and regulation which provided for an adjustment of the depreciation base for State income tax purposes authorized the taxpayer to deduct depreciation in an amount greater than the original cost price of the item depreciated, such rule and regulation would be invalid.

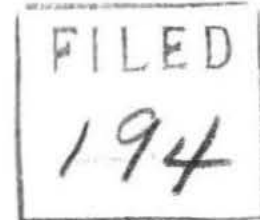
CONCLUSION

It is the opinion of this office that the Director of Revenue cannot promulgate a rule and regulation authorizing a taxpayer to take as a deduction on his income tax return depreciation in an amount greater than the original cost price of an item.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Yours very truly,

Thomas F. Eagleton
THOMAS F. EAGLETON
Attorney General



May 13, 1964

Honorable Warren E. Hearnes
Secretary of State
State Capitol Building
Jefferson City, Missouri

Dear Mr. Hearnes:

This will confirm our telephone conferences with Mr. Hill, Mr. Slicer and you respecting the application of Section 120.545, RSMo Cum. Supp. 1963, as a result of the death of Honorable Clarence Cannon, Congressman, 9th District, who died on May 12, 1964.

1. Under Section 120.545 because Clarence Cannon was the incumbent and died after the close of filing for the primary and because another person has filed in the primary for the office for the same political party, then the filing period is reopened commencing immediately.

2. The reopened period for filing computed in accordance with Section 1.040, RSMo 1959, expires at midnight Monday, May 18, 1964.

3. The reopening period permits filing for the office of Congressman in the 9th District in all political parties.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

By
J. Gordon Siddens
Assistant Attorney General

JGS:lo

May 21, 1964



Honorable James I. Spainhower
State Representative
Saline County
516 S. Drive
Marshall, Missouri

Dear Mr. Spainhower:

This is in answer to your letter of recent date in which you inquired regarding the provisions of Section 30(a) of Article IV of the Constitution of Missouri, adopted March 6, 1962, providing for the allocation of the motor vehicle fuel tax in this state.

As you stated in your letter, the allocation to incorporated cities, towns and villages is restricted to those cities, towns and villages having a population of more than two hundred according to the last preceding Federal Decennial Census. You inquire as to whether it would be possible for a lawsuit to be filed to determine the validity of such constitutional provision.

It is possible to test the validity of a state constitutional provision in a lawsuit. While the provisions for allocating gasoline taxes are now a part of the State Constitution, the legality of the adoption of such constitutional provision could be tested in court. Also, any state constitutional provision which contravenes the Federal Constitution will be held to be void. *Fisk v. Police Jury*, 116 U.S. 131, 6 S. Ct. 329, 29 L. Ed. 587.

Page Two
Honorable James I. Spainhower

I would be very doubtful that any court would hold the provisions of Section 30(a) of Article IV of the Constitution of Missouri invalid. However, as stated above, it is possible to file a lawsuit to test the validity of such constitutional provision. We do not in any way attempt to decide what sort of suit could properly be filed or in what court it could be filed or by whom. This is a matter to be determined by the lawyer who files the lawsuit. We simply hold that it is possible to file a suit testing the validity of such constitutional provision.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

OPINION NO. 198
ANSWERED BY LETTER
(Kingsland)

June 23, 1964



Honorable Don F. Whitcraft
Prosecuting Attorney
Cass County
Harrisonville, Missouri

Dear Mr. Whitcraft:

This is in answer to your letter dated May 13, 1964, inquiring as to our interpretation of Section 563.430, as amended, with reference to a particular proposed contest in your county.

It is my understanding that an auto race track charges admission to view the race. Later there is a drawing made of the admission tickets, and the winner of this drawing is permitted to participate for the prize.

I am enclosing a copy of an opinion of this office dated June 22, 1964, regarding the amended lottery statute. I believe this opinion fully answers the question propounded in your letter. You note in your letter, "It is to be pointed out that there is no additional charge for admission for anyone to participate in the drawing". It is our opinion that those who pay for admission are paying the necessary valuable consideration to participate in the drawing, and it is therefore illegal under Section 563.430, as amended by the 1963 legislature.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

RDk:bjj

Enclosure

Opinion No. 200 Ans. By Letter
(Randolph)



July 1, 1964

Mr. John E. Kelley
County Counselor
Jackson County Courthouse
Suite 209
Kansas City, Missouri

Dear Mr. Kelley:

This is in answer to your letter of recent date in which you request an opinion of this office on the question of whether Jackson County is liable for payment of the cost of maintenance as county patients of indigent persons who have been acquitted of a crime by reason of insanity in Jackson County and committed to a state mental hospital; or persons who were convicted in Jackson County but were transferred to state mental institutions, who were not residents of Jackson County at the time of their convictions or acquittals.

It is our understanding that no action has been taken by the courts of Jackson County to tax as costs, upon application, the expenses for the care and treatment in a state mental institution of an accused, or a defendant transferred to the mental institutions under Sections 552.040 or 552.050, RSMo Cum. Supp. 1963, as is provided for in Section 552.080, RSMo Cum. Supp. 1963, and this letter is therefore limited to those cases in which no such costs have been taxed under Section 552.080.

Section 202.415, RSMo, provides as follows:

"No patient shall become a charge upon any county or city, unless such person has been a bona fide resident of such city or county at least one year next previous to the time when such patient is confined in such hospital."

You have cited Section 202.100, RSMo, which makes reference to Section 546.530, RSMo, now repealed.

Section 202.100 provides as follows:

"No person shall be entitled to the benefit of the provisions of this law as a county patient, except persons whose insanity has occurred during the time such person may have resided in the state, and except the insane poor under sentence as criminals, as provided in sections 546.510 to 546.540, RSMo. Every patient in a state hospital shall be deemed to be the county patient of the county first sending him until one year after his regular discharge from the hospital."

The provisions of such section clearly provide that the benefits of the provision of the law as a county patient shall not be granted to any persons except those whose insanity occurred during their residence in the State of Missouri, with the exception that the insane poor under sentence as criminals may come under the law as county patients whether the insanity occurred during the residence in Missouri or not. In the case of *Thomas v. Macon County*, 175 Mo. 68, the Supreme Court held that a county was liable for payment of expenses of indigents acquitted because of insanity in such county and committed to a state mental institution and indigent persons transferred to such institutions from correctional institutions after conviction in such county only if such persons were residents of such county.

Section 202.100 does make a reference to Section 546.540, RSMo, and such section has been repealed; however, we deem it unnecessary to determine whether the repeal of Section 546.540 also repealed the provisions of such section insofar as Section 202.100 is concerned because Section 546.540 did not attempt to shift the burden of such support as a county patient to any other county than the county of residence.

Therefore, a county is liable for the cost of care and maintenance of an individual at a state mental institution as a county patient only if such individual was a resident of such county when so committed.

Mr. John E. Kelley

-3-

It is our view, therefore, that:

Jackson County is not liable for the payment for the cost of maintenance as county patients of indigent persons who have been acquitted of crimes by reason of insanity in Jackson County and committed to state mental hospitals, or who were convicted in Jackson County but transferred to state mental institutions - who were not residents of Jackson County at the time of their conviction or acquittal. As pointed out above, this letter is based upon the assumption that costs have not been taxed as provided in Section 552.080.

Very truly yours,

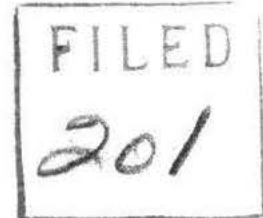
THOMAS F. EAGLETON
Attorney General

(DLR:lt)

CHECKS: Corporate officer who makes or
INSUFFICIENT FUND CHECKS: delivers insufficient fund check
CRIMINAL LAW: of corporation to pay corporate
CORPORATIONS: debt with intent to defraud and
CORPORATION OFFICERS: with knowledge of insufficient
funds subject to prosecution under
Section 561.460.

OPINION NO. 201

August 6, 1964



Honorable Leroy Schantz, Director
Division of Employment Security
421 East Dunklin Street
Jefferson City, Missouri

Dear Mr. Schantz:

This is in reply to your opinion request of May 18,
1964, in which you state:

"As you can appreciate, there are many corporations subject to the Employment Security Law who pay the taxes due thereunder by check. The question has arisen whether an officer, signing the check of a corporation which is returned because of insufficient funds, is subject to prosecution under the terms of Sections 561.460 and 561.470, RSMo 1959, as amended.

"The office of the Prosecuting Attorney in St. Louis has suggested that we request an opinion from you, pointing out, incidentally, that Section 561.460, as amended October 1963, provides for penalties coming within the separate jurisdictions of the Circuit Attorney and the Prosecuting Attorney.

"We would greatly appreciate having your opinion on this point."

Section 561.460, RSMo Cumulative Supplement 1963, provides:

"Any person who, to procure any article or thing of value or for the payment of any past due debt or other obligation of whatsoever form or nature or who, for any other purpose, shall make or draw or utter or deliver, with intent to defraud, any check, draft or order, for the payment of money, upon any bank or other depository, knowing at the time of such making, drawing, uttering or delivering, that the maker or drawer has not sufficient funds in or credit with such bank or other depository for the payment of such check, draft, or order, in full, upon its presentation, shall be guilty of a misdemeanor, and punishable by confinement in the county jail for not more than six months, or a fine of not more than five hundred dollars, or both fine and confinement. If the check, draft or order is one hundred dollars or more the offense is a felony punishable by a fine of not more than one thousand dollars, or by confinement in the county jail for not more than one year, or by both such fine and confinement or by imprisonment by the department of corrections for not more than five years."

In prosecutions under "worthless check" statutes, the cases have generally held that where a corporate officer issues a worthless check in the corporate name, he may be held personally liable for violating a penal statute imposing criminal penalties on anyone who, with intent to defraud another of money or property, draws or issues a check on any bank with knowledge that he has not sufficient funds in such bank to meet the check on presentment. This personal liability is predicated on the principle that a corporate officer cannot shield himself from criminal responsibility for his own act on the ground that it was the act of the corporation and not his personal act. Thus, the contention that the corporate officer is not personally liable because he signed the check merely as an agent for the corporation or because the corporation, not the officer, is the actual maker of the check, has been held to be without merit.

In Clifton v. State of Delaware, 145 A. 2d 392, 68 A.L.R. 2d 1266, appellant, president of a corporation, was indicted and convicted of four charges of violating the Delaware statute relating to the making and uttering of worthless checks.

These checks were of the "Clifton Motor Co., Inc.", a corporation, and were signed "John E. Clifton, Pres.". The Delaware statute (11 Del. C. § 555), which was similar to Section 561.460, RSMo Cum. Supp. 1963, provided in part:

"Whoever makes, draws, utters or delivers any check, draft or order for the payment of money, to the value of \$100 or more, upon any bank or other depository knowing at the time of such making, drawing, uttering, or delivering that the maker or drawer has not sufficient funds in, or credit with, such bank or other depository for the payment of such check, draft or order, in full, upon its presentation, shall be fined in such amount, or imprisoned for such term, or both, as the court, in its discretion, may determine."

On appeal before the Delaware Supreme Court, appellant contended that the Delaware statute did not apply to the case of a person who in his official capacity as a corporate officer knowingly issued a worthless check on the corporate bank account because the corporation is the maker and utterer of the check and said statute does not include the officer who signs and delivers the worthless check.

In rejecting this contention and holding that appellant, a corporate officer who issues a worthless check in the name of his corporation, can be held liable under the Delaware worthless check statute, the Delaware Supreme Court stated:

"* * * The statute is enacted in furtherance of a public policy to punish a special sort of commercial fraud, whether the fraud be committed in an individual or official capacity. To construe it as defendant seeks to do would be to emasculate it. Corporations must act through human beings, and the human being who violates the law is responsible for his acts. This principle is well settled.

"We find almost no dissent from the proposition that an officer of a corporation is criminally liable for his acts, though done in his official capacity, provided that he himself committed the act or aided or abetted in the doing of it. 3 Fletcher,

Cyclopedia Corporations, § 1348; 13 Am Jur, 'Corporations', §§ 1100-1102. For cases involving embezzlement or larceny, see State v Thomas, 123 Wash 299, 212 P 253, 33 ALR 781, and the cases collected in the annotation, pp. 787-792.

"The principle is applicable to violations of the worthless check statutes. State v Cooley, 141 Tenn 33, 206 SW 182; State v Stemen, 90 Ohio App 309, 106 NE2d 662. See also People v. Siman, 119 Misc 635, 197 NYS 713, sustaining an indictment against two corporate officers for violation of a worthless check statute.

"As has been said many times by the courts, one who commits a crime may not shield himself from punishment because he committed the crime in the name of the corporation."

See also: State v. Cooley, 141 Tenn. 33, 206 S.W. 182.

Although there are no Missouri cases directly on point regarding this subject, our Missouri Supreme Court, en banc, in State v. American Insurance Company, 140 S.W. 2d 36, indicated that a corporate officer who violated the criminal laws of this state could be prosecuted as an individual by stating at page 40 [3,4]:

"Conduct of officers and agents of a corporation, which is criminal under the laws of the state, is both a violation of the criminal law by the individual (and in some instances also by the corporation), for which there may be prosecution by criminal information and indictment * * *."

Section 561.470, RSMo Cum. Supp. 1963, merely creates the legal presumption that a check refused by the drawee because of insufficient funds is made, drawn, uttered or delivered by the maker or drawer thereof with knowledge of such insufficient funds. Said section states:

"As against the maker or drawer thereof, the making, drawing, uttering or delivering of a check, draft or order, payment of which is refused by the drawee, shall be


prima facie evidence of intent to defraud and of knowledge of insufficient funds in or credit with, such bank or other depository, provided such maker or drawer shall not have paid the drawee thereof the amount due thereon, together with all costs and protest fees, within ten days after receiving notice that such check, draft or order has not been paid by the drawee."

CONCLUSION

It is the opinion of this office that a corporate officer who makes, draws, utters or delivers an insufficient funds check of his corporation to pay a corporate debt with intent to defraud and with knowledge of such insufficient funds is subject to prosecution under the provisions of Sections 561.460 and 561.470, RSMo Cum. Supp. 1963.

The foregoing opinion, which I hereby approve, was prepared by my assistant, George W. Draper, II.

Very truly yours,

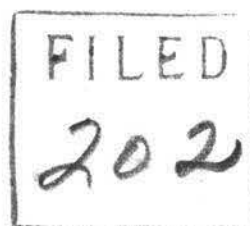

THOMAS F. EAGLETON
Attorney General

SCHOOLS: 1. Where all members of the county
COUNTY BOARD OF EDUCATION: board of education (Section 165.657
NOTICE: et seq., RSMo) have actual knowledge
of the time, place, and purpose of a
meeting reasonably in advance, failure to mail written notice as
prescribed by Section 165.663, RSMo 1959, does not invalidate
the meeting. 2. If no notice (either that prescribed by Section
165.663 or any other) is given of a meeting of a county board of
education and all of the members do not attend and the absent
members could have attended if notified, then the meeting and any
transactions thereat which require board action are invalid.

August 31, 1964

Opinion No. 202

Honorable Frank Conley
Prosecuting Attorney
Boone County
Columbia, Missouri



Dear Mr. Conley:

This opinion is issued in response to your request of
May 15, 1964.

You inquire as to what notification is necessary for a
valid meeting of the county board of education. Specifically
you inquire as to the effect of failure to give notice by the
method prescribed in Section 165.663, RSMo 1959.

From your letter, supplemented by our telephone conver-
sation, we are informed of the following: On April 7, 1964,
six members of the county board of education newly created
by Section 165.657 (4), RSMo 1963 Supp., were elected by
popular vote. On April 10, 1964, some members of the former
county board (existing under Section 165.657, RSMo 1959) and
some of the members of the new board assembled. No notice,
written or oral, was given to anyone that the new board would
meet on that date. The members of the old board were verbally
notified at an earlier meeting that the old board would meet
on that date. No notice by the method prescribed in Section
165.663 was given of a meeting of either the old or the new
board. Two persons who were members of both the old and new
boards were not present on April 10. All other members of
both boards were present. On April 10 officers of the new
board were purportedly elected.

Honorable Frank Conley

The county board elected April 7, 1964, was not a continuation of the former board. Section 165.657 (4), RSMo 1963, Supp., created a new body in second, third and fourth class counties to be selected by popular rather than representative election. All six members of the new body were elected April 7, 1964. Thereafter the prior body existing under Section 165.657, RSMo 1959, ceased to have official existence. Thus we must consider the events of April, 10 as involving two separate and distinct boards and two separate meetings.

We are of the opinion that where no notice of the meeting is given and not all of the members attend and the absent members could have attended, if notified, then the meeting and any transactions thereat requiring board action are invalid.

The affairs of a school district which require board action must be transacted at a valid board meeting.

"The separate and individual acts and decisions of the director members, even though they be in complete agreement with each other, have no effect. They must be assembled and act as a board." State v. Consolidated School Dist. No. 3, Mo. App., 281 SW2d 511, 513.

This office has ruled that two directors of a common school district cannot function without proper notice to the third member. See Opinion No. 51 (5-17-38) to Charles F. Lamkin, Jr., enclosed.

As stated in Corpus Juris Secundum:

"As a general rule, which, in some jurisdictions, has been enacted into an express statutory requirement, a proper call or notice of a meeting of a board of education, or of directors, trustees, or the like, of a school district or other local school organization, must be given or communicated to each member of such board in advance of such meeting, in order to render proceedings had thereat valid, and a want of such notice to any member who does not attend the meeting will invalidate the action taken, * * *." 78 C.J.S., Schools § 1236.

Honorable Frank Conley

Section 165.663, RSMo 1959, provides for notice of meetings of the county board of education as follows:

"Written notice of any meeting shall be given by mail to each member of the board by the secretary at least six days before the date of any meeting."

Therefore, an essential prerequisite of a valid meeting of a board of education is notice to all members of the board who can possibly attend.

Having concluded that notice to the members of the county board of education is a requisite for a valid meeting, must the notice be given only in the manner prescribed by Section 165.663? We are of the opinion that where all members of the county board of education have actual knowledge of the time, place and purpose of a meeting reasonably in advance of the meeting that failure to give notice in the manner prescribed by Section 165.663 does not invalidate the meeting.

Having notice basically denotes a state of knowing. For certain purposes the law infers (rebuttably or conclusively) that if certain acts have been done then a party has knowledge e.g., recording of instruments, notice by publication. This by-force-of-law notice we term constructive notice. To distinguish constructive notice from the basic concept of notice, the term actual notice is used. Constructive notice has been described as "the law's substitute for actual notice" 39 Am. Jur., Notice § 7. Constructive notice is the creation of day to day expediency.

To one giving notice, constructive notice is utile and necessary, nevertheless it is inferior to actual notice from the point of view of the person charged with having knowledge. If the purpose of a notice is to give another knowledge, giving actual notice best achieves the purpose. Thus, where actual notice is given reason requires that the failure to give constructive notice be considered as without consequence. To conclude otherwise would be to reason that where substitutes are permitted the use of the real is not sufficient.

The notification prescribed by Section 165.663 is to be conveyed by mail. Generally speaking, under this statute proof of mailing notice would satisfy the requirement of notice of the meeting whether or not the notice was received. 66 C.J.S., Notice § 18 (e). Hence, the notice prescribed by Section 165.663 is constructive as opposed to actual notice. It is an expedient substitute for actual notice.

Honorable Frank Conley

The purpose of Section 165.663 is twofold. The notification is primarily to give the members of the board advance knowledge of the time and place of board meetings. The secondary purpose of Section 165.663 is to allow the expediency of constructive notice by mail. Could it be reasonably argued that placing a notice in a mail box with the contingencies of the notice being lost in transit, misdelivered or the addressee being absent or removed, is a more effective method of conveying the facts than direct personal communication? We think not.

We note that in some circumstances actual notice does not excuse compliance with formal notice requirements. In these cases notice is not merely to give knowledge but also to make and preserve a formal record, e.g., notice of appeal. See: Merrill on Notice §§ 505 et seq.

With these rules in mind let us examine the notice prescribed by Section 165.663 (quoted supra, p. 3). Nothing in Section 165.663 requires the preservation of the notice. We do not see any formal significance in the document per se. The purpose of the notice there prescribed is primarily to give knowledge and not to make a record. We conclude that Section 165.663 does not create a formal notice requirement such as cannot be satisfied by actual notice.

You have informed us that all the members of the old county board were notified at the last preceding meeting of the board of the April 10 meeting. Under such facts it is our opinion that failure to mail notice as prescribed by Section 165.663 did not invalidate the meeting of the old board held April 10, 1964. The members of the old board had actual notice. This was sufficient.

Note by analogy the case of Johnson v. Dye, Mo. App., 127 SW 413, which involved the meeting of a common school district board. In that case the court held that where the members of the school board agreed at a lodge meeting to hold a board meeting on a certain date, that meeting was regularly called and the absence of the president and clerk did not affect the legality of the meeting.

You have informed us that no notice, under Section 165.663 or otherwise, was given of a meeting of the new board. Thus, the events of April 10 did not constitute a valid meeting of the new board unless by some factor notice was waived or excused.

Honorable Frank Conley

You do not inform us that notice was waived. Thus, that possibility is eliminated and will not be discussed further.

The law often excuses notice where all the members not notified are actually present. However, from your information only four of the six members of the new board were present. Attendance by or notice given to a majority or a quorum is not sufficient.

The county board of education is a deliberating body. Section 165.673 obligates the board to study, prepare and revise reorganization plans, to approve audits and budgets, to advise with school officials. Also the board selects its own officers. These matters require deliberation and the exercise of judgment. The decisions of the board are the joint and collective judgment of its members. Every member of the board has the right to participate by discussion, persuasion, and vote in forming the decisions of the board. Also it should not be forgotten that the members of the board are the representative voices of the citizens. To allow some members of the board to transact business without giving notice to the other members would be contrary to these rights and interests. See: McQuillan on Municipal Corporations, 3rd Edition, §§ 13.08, 13.37. Thus the presence of four of six members of the new board on April 10 did not excuse notification.

Notice was given to the members of the old board of the meeting of April 10, 1964. Since the county board of education elected April 7, 1964, was not a continuation of the prior board, notice to the old members of the meeting of the old board is not notice nor excuses notice to the new members of a meeting of the new board. Each board and each meeting must be considered separately.

Where the time and place of a meeting is prescribed by statute the courts have held this alone sufficient notice. 78 C.J.S., Schools, § 133 (b). As to the first meeting of the board, Section 165.660 states:

"The said county board of education shall, within four days after its election, meet in the office of the county superintendent of schools and organize by electing one of its members as president."

Honorable Frank Conley

Although this statute prescribes the place of the meeting, it is indefinite as to the date and time (within a four day period) of when the first meeting shall be held. Therefore, it is our opinion that Section 165.660 is not notice nor does it remove the obligation to give notice of the first meeting. (We note that Section 165.663 requires six days notice whereas Section 165.660 requires the first meeting to be held within four days of the election. However since no attempt was made to give notice under Section 165.663 it is not necessary for us to decide here the effect of the four day provision of Section 165.660 upon Section 165.663).

From the foregoing it appears that the members of the new county board were not notified, in any manner, written or oral, actual or constructive, of the purported meeting of April 10, 1964, and that notice was neither excused nor waived. We therefore conclude that no valid meeting of the new board was held.

Conclusion

It is the opinion of this office that:

1. Where all members of the county board of education (Section 165.657 et seq., RSMo) have actual knowledge of the time, place, and purpose of a meeting reasonably in advance, failure to mail written notice as prescribed by Section 165.663, RSMo 1959, does not invalidate the meeting.
2. If no notice (either that prescribed by Section 165.663 or any other) is given of a meeting of a county board of education and all of the members do not attend and the absent members could have attended if notified, then the meeting and any transactions thereat which require board action are invalid.

The foregoing opinion which I hereby approve was prepared by my Assistant, Louis C. DeFeo, Jr.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

Encl.

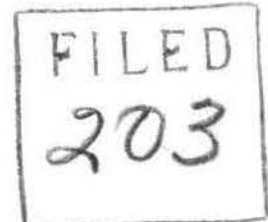
WORKMEN'S COMPENSATION:
DEPARTMENT OF CORRECTIONS:

An inmate of the Missouri State Penitentiary assigned for work in the license plate manufacturing division who sustains an injury as a result of an accident, arising out and in the course of said employment, is not an employee of the Department of Corrections, and, therefore, not entitled to benefits of the Workmen's Compensation Act.

FOR OPINION 203
(1964)

June 9, 1964

Honorable Spencer Givens
Director
Division of Workmen's Compensation
State Office Building
Jefferson City, Missouri



Dear Mr. Givens:

In your letter of May 19, 1964, you request an opinion on the following question:

Is an inmate of the Missouri State Penitentiary, who is employed in the license plate manufacturing division and who sustains an injury as a result of an accident arising out of and in the course of said employment, an employee of the Department of Corrections and therefore entitled to the benefits of the Workmen's Compensation Act?

Section 216.183, RSMo 1959, extends the provisions of the Workmen's Compensation Law to all of the employees of the Department of Corrections.

Section 287.030, RSMo 1959, defines an "employer" under the act as every person and corporation using the services of another for pay.

Section 287.020, (1), provides that the term "employee" includes every person in the services of an employer, under any contract of hire, express or implied, oral or written, or under any appointment or election.

Honorable Spencer Givens

99 C.J.S., §116, page 408, Workmen's Compensation, states: "A convict or prisoner performing work for the county or municipality during the term of his imprisonment is not an employee within the (Workmen's Compensation) act."

This state has passed a statute limiting the rights of persons convicted of a crime, commonly called the "Civil Death Statute". This statute, Section 222.010, RSMo 1959, provides that a sentence to imprisonment in an institution within the State Department of Corrections for a term less than life suspends all civil rights of the person so sentenced to the term thereof, and it further provides that a person sentenced to life imprisonment shall be deemed civilly dead. Concerning the above statute, the case of Gray v. Gray, 79 S.W. 505, states:

"The civil death which attaches to a person as an incident of his conviction of an infamous crime destroys his right to sue or to make executory contracts.
* * *

Larson on "Workmen's Compensation Law", Volume 1, Section 47.31, says:

"Convicts and prisoners have usually been denied compensation for injuries sustained in connection with work done within the prison, even when some kind of reward attended their exertions. The reason given is that such a convict cannot and does not make a true contract of hire with the authorities by whom he is confined."

In 1963 the Supreme Court of Indiana passed on the identical question under discussion here. Schraner v. State of Indiana, Department of Corrections, 189 N.E. 2d 119. The statutes there under discussion, defining both "employee" and "employer", were identical to Missouri's. The court held that there could be no contract of employment because the convict could not become an employee of the state. The court said at l.c. 123:

Honorable Spencer Givens

" * * * To permit inmates of penal institutions to avail themselves of the protection of the workmen's compensation law would establish a new and novel procedure."

This rule has been followed generally. In *Scott v. City of Hobbs*, 366 P. 2d 854 (N.M. Sup.), a prisoner who was working out a fine under a city ordinance was held not to come under the Compensation Act, and in *Jones v. Houston Insurance Company*, 134 So. 2d 377 (La.), it was held that a prison inmate, even though receiving a small wage, was not an "employee". In only rare instances has the rule holding that the prisoner is not an employee been abrogated, and in these cases the facts and circumstances were of an unusual nature, i.e., where a prisoner is "on loan" to a private corporation, *Johnson v. Industrial Commission*, 356 P. 2d 1021, (Ariz. Sup.), or under a special statute where the prisoner was working on a highway, *California Highway Commission v. Industrial Accident Commission*, 251 P. 808 (Cal. Sup.).

The direct question posed here has not been answered by the Missouri courts, but the courts elsewhere have consistently held that a convict may not avail himself of a Workmen's Compensation Act for injuries sustained, for the reason that no relationship of employer and employee exists.

This may seem to work an injustice, but under our statutes, as existing, no other conclusion could be reached.

As said by the Supreme Court in *Price v. Johnston*, 334 U.S. 266, 285; 68 Sup. Ct. 1049, 1060, "Lawful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system."

CONCLUSION


We are of the opinion that an inmate of the Missouri State Penitentiary, assigned for work in the license plate

Honorable Spencer Givens

manufacturing division, who sustains injury as a result of an accident arising out and in the course of such employment is not an employee of the Department of Corrections and is not entitled to the benefits of the Workmen's Compensation Law, Chapter 287, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,


THOMAS F. EAGLETON
Attorney General



July 1, 1964

Mr. E. H. Berry, President
Missouri State Board of Accountancy
217 State Capitol
P. O. Box 613
Jefferson City, Missouri 65102

Dear Mr. Berry:

Your letter of March 20, 1964, inquires whether employees of accounting firms, working as certified public accountants but not partners should be required to obtain annual permits to practice accountancy.

Section 326.210, RSMo 1959, requires an annual permit as a prerequisite to practicing public accountancy in this state during the applicable year. Thus, if anyone is practicing public accountancy within the meaning of our statutes, he must obtain an annual permit.

As to who is deemed to be practicing public accountancy, Section 326.010, RSMo 1959, states:

"A person shall be deemed to be in practice as a public accountant, within the meaning and intent of this chapter:

"(1) Who holds himself out to the public, in any manner, as one who is skilled in the knowledge, science and practice of accounting, and as qualified and ready to render professional service therein as a public accountant for compensation; or

"(2) Who maintains an office for the transaction of business as a public accountant; or

"(3) Who offers to prospective clients to perform for compensation, or who does perform in behalf of clients for compensation, professional services that involve or require an audit or certificates of financial transactions and accounting records; or

"(4) Who prepares or certifies for clients reports of audits, balance sheets, and other financial, accounting and related schedules, exhibits, statements or reports, which are to be used for publication or for credit purposes, or are to be filed with a court of law, or with any other governmental agency, or are to be exhibited to or circulated among third persons for any purpose;"

An exception is made in the cases of persons "who may be employed by one or more persons, firms or corporations for the purpose of keeping books, making trial balances or statements or preparing reports, provided such reports are not used or issued by the employer or employers as having been prepared by a public accountant".

No exception is made in the case of an employee of an accounting firm issuing reports which are represented as having been prepared by public accountants.

Further, Section 326.030 provides that no person shall represent himself as, permit himself to be styled or known as, or use or assume the title of a certified public accountant or of a public accountant, nor add or suffix, nor permit the addition or suffixing to his name or business appellation the initials CPA or any such designation or any letters, initials or words indicating or giving reasonable ground to understand that he is a certified public accountant or public accountant, unless such person is properly registered.

It follows that unless a given employee comes within the above exception, he is required to pay the annual fee and obtain the annual permit if he does any of the acts enumerated in Section 326.010 as constituting the practice of public accountancy or if

Mr. H. D. Berry, President

-3-

he represents himself or permits himself to be represented as contemplated by Section 326.030. In short, a person does not become exempt from the operation of Chapter 326 simply by accepting employment in an accounting firm.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

DLR:lt:kd



July 22, 1964

Honorable Daniel V. O'Brien
Prosecuting Attorney
St. Louis County
Courthouse
Clayton, Missouri--63105

Dear Mr. O'Brien:

In your letter of April 13, 1964, you ask for our opinion regarding the validity of an ordinance passed by the Board of Aldermen of the City of Vinita Park, a city of the fourth class.

In a subsequent letter of June 18, 1964, from Robert R. Schwarz, Attorney for the City, he advises us that the city became a city of the fourth class in 1950, that no chief of police was appointed and a marshal was elected. The present marshal has been continuously returned to office since.

The question you propound is, "Does the ordinance encroach on the power of the marshal and is the ordinance therefore void?"

The ordinance in question dated April 13, 1964, passed by the board of aldermen provides:

- (1) for the appointment of a "board of police commissioners" who shall "supervise the operation" of the police department; and
- (2) the board of police commissioners shall adopt rules and regulations for the police department.

Section 79.050, RSMo. as amended in 1961 (Cum. Supp. 1963), provides that if no chief of police is appointed by the board of aldermen after approval by the electorate, then and in that event a city marshal will be elected. This was done in Vinita Park.

July 22, 1964

In Opinion No. 149, to you under date of April 22, 1964, a very similar question was discussed and Section 79.050 was construed.

Nowhere in the statutes governing the police system in a city of the fourth class is there a direct statement setting forth exactly who is to supervise the office of marshal or chief of police. We find no authority for the appointment of a board of police commissioners for a city of the fourth class. In *State v. Smith*, 139 S.W. 2d 929, it was held that the board of aldermen in a fourth class city has only such powers as are conferred on it by statute.

Section 85.610, RSMo. 1959, provides that the marshal in cities of the fourth class shall be the chief of police.

Section 85.620, RSMo. 1959, provides that the number and the tenure of policemen is to be regulated by ordinance. It was the intention of the Legislature in our opinion to make the marshal the chief law enforcement officer of the city.

The indicated function of the board of police commissioners is to adopt "rules and regulations" and to "supervise the police department". It appears that by appointing a board of police commissioners, the board would take over the functions of the marshal who is also the chief of police.

This, we believe, to be contrary to the intent of the Legislature relating to the police system in fourth class cities.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

November 5, 1964



Honorable Daniel V. O'Brien
Prosecuting Attorney
St. Louis County
Courthouse
Clayton, Missouri 63105

Dear Mr. O'Brien:

Our office has made a study of the problem you pose in your letter of May 21, 1964, regarding the pension plan in the City of Richmond Heights.

The policy of this office is to not write official opinions in matters which are purely municipal law. The reason for this is that municipalities are authorized to employ attorneys to advise and represent them in such matters. We are willing wherever possible to make suggestions and offer ideas to municipal attorneys that may assist them in the solution of their problems.

Therefore, we are not issuing any official opinion in this matter. We are, however, enclosing a memorandum prepared by some of the members of our staff which represents their views and ideas with the hope that these ideas and suggestions will assist the city attorney in the solution of his problem.

If the problem is not solved, we recommend an appropriate suit, probably for declaratory judgment, would provide definite answers to this problem.

We hope this will be helpful to you.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JGS:lt:lo

Enclosure

Opinion No. 207
Answered by Letter

June 8, 1964

Honorable Robert E. Yocom
Prosecuting Attorney
McDonald County
Pineville, Missouri



Dear Mr. Yocom:

This letter is in reply to your recent inquiry concerning the withdrawal of candidates from the primary. You have inquired regarding the appropriate manner or method for a candidate to advise the County Clerk with respect to his withdrawal.

Herewith enclosed please find a copy of an opinion of this office dated July 28, 1954 to Honorable Lawson Romjue. This opinion holds that a candidate may withdraw as a candidate by appropriate written advice to the County Clerk and that such withdrawal need not be acknowledged. While there are no statutes applicable, we are of the view that in the interest of orderly procedure, withdrawal of candidates should be in writing to the County Clerk. Section 120.230 RSMo, 1959, is not applicable to the problem. Under the ruling of State ex rel. Preisler vs. Toberman, 269 SW2d 753, this Section is applicable only to candidates who have been nominated by the petition method.

With reference to your inquiry concerning whether a candidate may file for two offices, we are enclosing herewith a copy of two opinions of this office under date of December 20, 1961 addressed to Honorable Harry Keller and under date of May 22, 1958 addressed to Honorable William C. Myers, Jr., which I believe answer this question.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JDF:df

Enc. (3)

INSURANCE: Articles of Incorporation of Capitol Mutual Casualty Insurance Company.

Opinion No. 208

May 25, 1964



Honorable Ralph H. Duggins
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

In compliance with your request of May 22, 1964, an executed copy of the original Articles of Incorporation of the proposed Capitol Mutual Casualty Insurance Company, together with proof of publication of the same as required by Section 379.030 RSMo 1959, have been reviewed by this office pursuant to the directive contained in Section 379.220 RSMo 1959.

A deficiency on the face of the Articles of Incorporation is noted in their failure to disclose, as required by Section 379.210 RSMo 1959, "the names and addresses of those composing the board of directors in which the management shall be vested until the first meeting of the members". Such deficiency, not going to powers granted, is not deemed a legal impediment to issuance of the certificate here granted.

It is the opinion of this office that the Articles of Incorporation of the proposed Capitol Mutual Casualty Insurance Company, to be organized pursuant to Sections 379.205 to 379.310 RSMo 1959, as amended, are in accordance with the provisions of said cited statutes, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO/dg

OPINION NO. 210
ANSWERED BY LETTER
(Kingsland)

May 27, 1964



Honorable Bill D. Burlison
Prosecuting Attorney
Cape Girardeau County
Cape Girardeau, Missouri

Dear Mr. Burlison:

By letter dated May 20, 1964, you requested our opinion on three questions relating to the conduct of the county collector's office in Cape Girardeau County. You enclosed an opinion rendered by your office to the county court in answer to the same three questions.

After carefully reviewing the opinion rendered by you, prior opinions of this office and the applicable statutes, we have reached the following conclusions.

1. It is our understanding that the city and county each own an undivided one-half interest in the courthouse, and there is no formal understanding as to the respective rights of the parties in the actual physical property involved. Under these circumstances, it is impossible for this office to render an opinion as to the legal rights of one of the parties with respect to a certain portion of the property in question. We believe you are correct in concluding that in the event an agreement cannot be reached, this question could only be resolved by a court proceeding.

2. It is also true that Cape Girardeau County no longer falls within the provisions of Section 52.120, RSMo 1959, which made it mandatory for the collector to

maintain a branch office for the convenience of the taxpayers. The question therefore becomes whether the Missouri statutes give county collectors discretion to open a branch office for the convenience of the taxpayers other than the mandatory feature of Section 52.120, RSMo 1959, supra. Section 52.110, RSMo 1959, provides:

"The collector shall keep his office at the county seat, except when meeting the taxpayers; provided, that in all counties in this state in which there is no bank located at the county seat and in which, according to law, two or more terms of the circuit court are held each year in some other town or city than the county seat and in which town or city are located one or more banks, the county collector may, at his option, keep his office in such town or city."

Section 139.010, RSMo 1959, provides:

"It shall be the duty of the collectors of revenue of the several counties of the state, immediately after the receipt of the tax books of their respective counties, to give not less than twenty days' notice of the time and place at which they will meet the taxpayers of their respective counties, and collect and receive their taxes; said notice shall be given by posting up at least four written or printed handbills in different parts of each municipal township in said counties, and by publication for two weeks in a newspaper, if one be published in the county, in which he shall notify said inhabitants to meet the collector at such places in their respective townships as may be named therein, and the number of days, not less than three, that he will remain at each of such places for the purposes aforesaid; and it shall be his duty to attend at the time and place thus appointed

either in person or by deputy, to receive and collect such taxes; provided, the county court may relieve the collector from visiting any municipal township in his county by an order of record to be made before notice under the provisions of this section is given."

In an opinion from this office dated October 4, 1963, addressed to the Honorable Herman G. Kidd, State Representative of Randolph County, it was ruled that the above quoted sections grant authority to all collectors to establish branch offices in locations other than the county seat for the convenience of the taxpayers.

It is therefore our opinion that the county collector of Cape Girardeau County may, in his discretion, establish an office in the Cape Girardeau Common Pleas Courthouse for the convenience of the taxpayers.

3. Although, as noted above, Section 52.120, RSMo 1959, no longer applies to Cape Girardeau County, there are still in effect general statutes applying to the duties of the county to county officers. Included in these general statutes is Section 49.510, RSMo 1959, which provides:

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury or said county at the time and in the manner that the county court may direct." (Emphasis supplied.)

Honorable Bill D. Burlison

-4-

Under the authority of the above quoted section, it would appear that if the county court is of the opinion that this branch office is necessary for the county collector to "properly carry on and perform the duties and functions" of his office, the county court may provide such office rent free.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

RDK:bjj

August 24, 1964



Dr. H. M. Hardwicke
Acting Director
Division of Health
Jefferson City, Missouri

Dear Dr. Hardwicke:

In your request for an opinion you inquire as to the authority of the Division of Health to enforce "food service sanitation regulations" in restaurants throughout the State of Missouri. The applicable Missouri statutes appear to be as follows:

"192.020. To safeguard the health of the people of Missouri.--It shall be the general duty and responsibility of the division of health to safeguard the health of the people in the state and all its subdivisions. It shall make a study of the causes and prevention of diseases. It shall designate those diseases which are infectious, contagious, communicable or dangerous in their nature and shall make and enforce adequate orders, findings, rules and regulations to prevent the spread of such diseases and to determine the prevalence of such diseases within the state. It shall have power and authority, with approval of the director of public health and welfare, to make such orders, findings, rules and regulations as will prevent the entrance of infectious, contagious and communicable diseases into the state."

"196.190. To what places law applies. -- Every building, room, basement, or cellar occupied or used as a bakery, confectionery, cannery, packinghouse, slaughterhouse, restaurant,

Dr. H. M. Hardwicke, Acting Director

hotel, dining car, grocery, meat market, dairy, creamery, butter factory, cheese factory, or other place or apartment used for the preparation for sale, manufacture, packing, storage, sale or distribution of any food, shall be properly lighted, drained, plumbed and ventilated and conducted with strict regard to the influence of such condition upon the health of the operatives, employees, clerks or other persons therein employed, and the purity and wholesomeness of the food therein produced; and for the purpose of sections 196.190 to 196.265, the term "food", as used herein, shall include all articles used for food, drink, confectionery condiment, whether simple, mixed or compound, and all substances or ingredients used in the preparation thereof."

"196.230. Abatement of violations by director.--The director of the division of health and his assistants or agents by him appointed, the state, county, city and town health officers shall have full power at any time to enter and inspect every building, room, basement or cellar, occupied or used, or suspected of being used, for the production for sale, manufacture for sale, storage, sale, distribution or transportation of food and all utensils, fixtures, furniture and machinery used as aforesaid, and if upon inspection any food producing or distributing establishment, conveyance, employer, operative, employee, clerk, driver or other person is found to be violating any of the provisions of sections 196.190 to 196.265, or if the production, cooking, preparation, manufacture, packing, storing, sale, distribution or transportation of food is being conducted in a manner detrimental to the health of the employees and operatives and the character or quality of the food therein

Dr. H. M. Hardwicke, Acting Director

being produced, manufactured, packed, stored, sold, distributed or conveyed, the officer or inspector, making the examination or inspection, shall furnish evidence of said violation to the prosecuting attorney of the county in which the violation occurs, and it shall be the duty of all prosecuting attorneys to represent and prosecute, in behalf of the people, when called upon by the director of the division of health to do so, all such cases of offenses arising under the provisions of sections 196.190 to 196.265. When complaint is made by the said director of the division of health, security for costs shall not be required of the complainant in any case at any time of the prosecution or trial."

"196.240. Authorization by director to close health menace. -- It shall be the duty of the director of the division of health, and he is hereby authorized and empowered, to close any market place, grocery store, general store, bakery, confectionery, butcher shop, slaughterhouse, dining car, refrigerator car, cold storage plant or warehouse, hotel dining room or kitchen, cafe, restaurant, lunch counter, drug store, or any other place, or places, where articles or commodities intended for human food, or for human consumption as medicine, are manufactured, sold, stored or prepared for sale, or wherever food and drink is served, where such places shall, in the judgment of said director, constitute a menace to the public health, by reason of dirt, filth, or other insanitary cause."

"196.265. Penalty for violation.--Any person who shall fail, or refuse, to obey any order of the director of the division of health to close any place, or places, mentioned in section 196.240, or who shall exhibit or expose for sale in any show window upon any sidewalk, any vegetables or other articles or commodities whatsoever intended for human food, in violation of any order of the director, or who shall, in any way, resist or interfere with the directors in the enforcement of sections 196.190 to 196.265,

Dr. H. M. Hardwicke, Acting Director

or any order of the director made pursuant to the authority of this law, shall be deemed guilty of a misdemeanor."

Reading these sections together, we have reached the following conclusions in regard to your respective questions:

(1) "Food Service Establishment," as defined in Paragraph 11 of Section A of your Regulations is consistent with and comes within the scope of authority authorized by Section 196.190 RSMo 1959.

(2) It is our opinion that Section 192.020 authorizes the promulgation of the Regulations about which you have inquired. We are further of the opinion that Sections 196.190 to 196.265 are applicable where these Rules and Regulations have been violated. Reading these sections together, we believe that the penalties there enumerated can be invoked, in an appropriate fact situation. In other words, it appears that Section 196.240 authorizes the director to close a food service business if it is operating as a health menace and contrary to these Rules and Regulations. It also appears that under Section 196.265 the person resisting the enforcement of these provisions would be operating unlawfully.

(3) As to the right of entry for the purpose of making inspections, we believe that Section 196.230 adequately defines the circumstances under which inspections may be made. That section provides that the health officer shall have full authority to inspect if the building involved is "occupied or used, or suspected of being used, for the production for sale, manufacture for sale, storage, sale, distribution or transportation of food * * *".

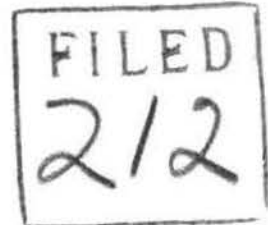
It appears to us that this right of inspection would be limited only by the requirement that it be done at reasonable times and that the facts recited above exist at the time the inspection is made.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

OPINION NO. 212
ANSWERED BY LETTER
(Chitwood)

June 15, 1964



Honorable Douglas Mahnkey
Prosecuting Attorney
Taney County
Forsyth, Missouri

Dear Mr. Mahnkey:

This office is in receipt of your request for a legal opinion, reading in part as follows:

"We voted on a bond issue for an airport in Taney County on May 19th and it was defeated by a small vote. The opposition came from two townships in the Eastern part of our County. The Commission would like to know if it is possible to organize an Airport District similar to the Drainage Districts and Road Districts and other districts in Missouri. If we could organize such a district, we could include the part of the County that is interested in the airport."

No explanation is given in your letter of the intended meaning of "airport district" other than the reference to the organization of an "Airport District similar to the Drainage Districts and Road Districts and other districts in Missouri."

While there are specific statutes on the procedure for the organization of both drainage and road districts, none of these statutes have any application to or bearing upon the organization of the so-called "airport districts", and we find it unnecessary to refer to any of said statutes.

We understand your inquiry to be whether or not it is (legally) possible to organize an "airport district" in your county for the purpose of establishing and operating an airport in said "airport district".

Sections 305.170 to 305.270, RSMo 1959, inclusive, is the statutory law of this state pertaining to airports.

Section 305.170, RSMo 1959, authorizes cities, villages, and towns to operate airports and reads as follows:

"The local legislative body of any city, including cities under special charter, village or town in this state is hereby authorized to acquire, by purchase or gift, establish, construct, own, control, lease, equip, improve, maintain, operate, and regulate, in whole or in part, a one or jointly or concurrently with others, airports or landing fields for the use of airplanes and other aircraft either within or without the limits of such cities, villages, or towns, and may use for such purpose or purposes any property suitable therefor that is now or may at any time hereafter be owned or controlled by such city, village, or town."

Section 305.180, RSMo 1959, authorizes counties to operate airports, the same as cities, villages and towns, as provided by Section 305.170, supra, except that counties can establish and operate airports only within the boundaries of such counties.

The terms "airport districts" have not been defined nor have they been expressly or impliedly referred to in Sections 305.170 to 305.270, RSMo 1959, the "airport law of Missouri", and "airport districts" are legally non-existent in said law.

Honorable Douglas Mahnkey

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Cities, villages, towns and counties are the only political subdivisions of the state which have been authorized to establish and operate airports, as will be noted from the provisions of Sections 305.170 and 305.180, RSMo 1959.

Therefore, in answer to the inquiry of the opinion request, it is our thought that under provisions of the Missouri Statutes, referred to above, it is (legally) impossible to organize an "airport district" in your county, for the purpose of establishing and operating an airport in said "airport district".

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PNC:bjj

Opinion No. 213, Answered by Letter
(Stephan)

June 30, 1964



Honorable Brunson Hollingsworth
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

Dear Mr. Hollingsworth:

This is in response to your recent request for an opinion of this office which inquires whether the City of Festus may, by contract or otherwise, lawfully have its assessments made by the county assessor's office rather than through its own assessor.

Such a contract is authorized generally by Section 70.220, RSMo 1959, and we also invite your attention to the provisions of Section 77.370, RSMo 1959, which applies to cities of the third class such as Festus and reads in part as follows:

"1. Except as hereinafter provided, the following officers shall be elected by the qualified voters of the city: Mayor, police judge, attorney, assessor, collector, treasurer and, except in cities which adopt the merit system police department, a marshal.

* * * * *

"3. Whenever a city contracts for the assessment of property or the collection of taxes by the county or township assessor or collector respectively, as authorized by section 70.220, RSMo, the city council shall by ordinance provide that at the expiration of the term of the then city assessor or collector, as the case may be,

Honorable Brunson Hollingsworth -2-

the office is abolished and thereafter no election shall be had to fill the office; except that in the event the contract expires and, for any reason, is not renewed, the council may by ordinance provide for the election of such officer at the next and succeeding regular elections for municipal officers."

We are also enclosing herewith a copy of an opinion issued on May 15, 1963, to the Honorable E. J. Cantrell, which relates to the general subject matter of your request.

On the basis of the foregoing authorities, your inquiry is answered in the affirmative, subject to the requirement set out in subparagraph 3 of Section 77.370, supra, to the effect that if such a contract is made "the city council shall by ordinance provide that at the expiration of the term of the then city assessor . . . the office is abolished and thereafter no election shall be had to fill the office; . . ."

We trust the foregoing will be of assistance to you.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

AJS:lt
Enclosure

INSURANCE: Articles of Incorporation of Covenant Security Insurance Company.

FILED

214

June 2, 1964

Honorable Ralph H. Duggins
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

This opinion is in answer to your inquiry of May 28, 1964, by which you submitted for examination and certification under Section 379.040 RSMo 1959 a re-executed copy of Declaration of Intention, including Articles of Incorporation, of original incorporators of the proposed Covenant Security Insurance Company, such re-execution being accomplished in conformity with suggestions made by this office in its opinion of May 14, 1964, addressed to you.

A review has been made of the re-executed Declaration of Intention referred to in the preceding paragraph, as required by Section 379.040 RSMo 1959, and it is the opinion of this office that the same is in accordance with the provisions of Sections 379.010 to 379.160 RSMo 1959, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

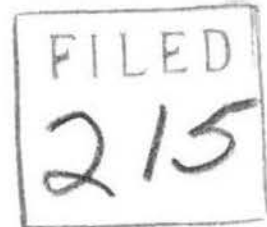
Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO/dg

OPINION NO. 215
ANSWERED BY LETTER
(Kingsland)

June 2, 1964



Honorable Charles H. Baker
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Mr. Baker:

This is in answer to your letter dated May 19, 1964, requesting our interpretation of the mandatory provisions of Section 165.693, regarding resubmission of plans for school district reorganization.

I am enclosing for your consideration an opinion dated January 29, 1960, addressed to Mr. Hubert Wheeler, which involves our interpretation of the statute in question. In the body of this opinion it is noted, page 6, that the purpose of this section is "to prevent the voters from being harassed with frequent elections on the same or substantially similar propositions". It is difficult to see how the formation of a new county board of education would affect this general proposition to hold that the election could then be held within the one year period and would have the end result of subjecting the voters to the "harassment" that the purpose of this statute is designed to minimize.

It is therefore the opinion of this office that the election on the formation of a new county board of education in no way affects the mandatory one year provisions of Section 165.693, supra.

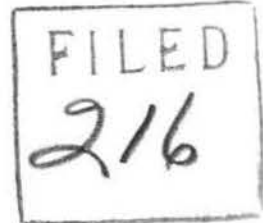
Yours very truly,

THOMAS F. EAGLETON
Attorney General

RDk:bjj

Enclosure

July 13, 1964



Honorable Gladys B. Stewart
Prosecuting Attorney
Douglas County
Ava, Missouri

Dear Mrs. Stewart:

This letter is in response to your requests of June 3, 1964, and June 16, 1964, for information regarding office and travel expenses of the county superintendent of Douglas County. In your letter of June 3, 1964, you inquire:

"The County Court of my county would like to know just exactly what expenses they must pay for the County Superintendent of Schools, particularly in connection with mileage and office. There is only one three-director district in the county and two reorganized grade districts and one reorganized high school district. The last three districts are six-director districts. The court needs to know what, if any, expenses incurred by the County Superintendent of Schools in the six-director districts are expenses they should pay from county revenue."

Your inquiry lacks specificity as to what items of office or travel expense are in question. However, we will attempt to point out some of the laws generally applicable to office and travel expense of the county superintendent of Douglas County. We note that Douglas is a county of fourth class.

As to the office expenses of county superintendents in a fourth class county: Clerical assistance expense is paid by the state up to \$750.00. Amounts over \$750.00 must be paid by

Honorable Gladys B. Stewart

the county. Clerical supplies must be furnished by the county. Section 167.030, RSMo 1959, provides:

" * * * He shall keep his office at the county seat, or at some other place in the county where a court of record is held, and the county court, by order of record, shall designate where the superintendent shall keep his office, and for this purpose the county shall supply him with a suitable room, properly furnished, wherein all records, books, papers, furniture and other property thereto belonging shall be securely kept; and at the expiration of his term of office he shall turn the same over to his successor in good condition, and said county court shall supply the superintendent with all necessary record books, stationery and postage stamps for properly conducting the business of his office, and shall allow all necessary printing of notices and circulars of information, the same to be paid for by warrant drawn upon the county treasurer."

As to mileage and travel expenses of the county superintendent in a fourth class county: As stated in Section 167.270 quoted *infra*, when a county superintendent furnishes his own conveyance mileage shall be seven cents per each actual and necessary mile traveled. Enclosed herewith is Opinion No. 75 (2-19-48) to James T. Riley which holds that necessary meals and lodging are to be considered as part of travel expense.

Traveling and clerical assistance expenses of county superintendents of fourth class counties are provided for in Section 167.270, RSMo 1959 which states:

"The county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent of his annual salary for actual and necessary traveling expenses. The county superintendent of public schools shall be permitted to employ clerical assistance, to whom there shall be paid not less than seven hundred and fifty dollars nor more than one

Honorable Gladys B. Stewart

thousand five hundred dollars annually to be determined and fixed by the county court, seven hundred and fifty dollars of which shall be paid by the state out of the state school moneys, the same to be included by the state board of education as a part of the apportionment made before August thirty-first of each year. The county court shall, upon presentation of his bill properly setting forth his actual and necessary expenditures for traveling expenses draw a warrant upon the county treasury for the payment of same. The county treasurer shall upon presentation of a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent and audited by the county court, draw a warrant each month for payment of same out of moneys provided by the state for such purpose, and the county court shall upon presentation of a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent, draw a warrant each month upon the county treasury for that part of the compensation for such purpose in excess of that provided by the state; provided, when the county superintendent shall furnish his own conveyance, the rate allowed for mileage shall be seven cents per mile for each mile actually and necessarily traveled; provided further, that all warrants in payment for clerical hire shall be drawn in favor of the person or persons who render such services, and in no case shall the county superintendent personally receive any part thereof."

From your letter it appears you are also concerned with the effect reorganization of school districts has upon the duties and compensations of county superintendents. Enclosed herewith is Opinion No. 56 (4-4-61) to Elva D. Mann. From this opinion you will note the following: The county superintendent has the duty to supervise transportation of only common school districts. Section 167.050, RSMo 1959. He has

Honorable Gladys B. Stewart

no duty to supervise transportation in any other type district. The duty of the county superintendent to supervise the preparation of budgets extends only to districts that do not employ a superintendent who devotes at least one-half of his time to the direct work of supervising. Sections 167.240, 167.040, RSMo 1959.

Your county superintendent is to be paid out of the county treasury for all "actual and necessary traveling expenses". Section 167.270. Generally speaking, your county superintendent is entitled, within the limits of Section 167.270 to actual and necessary travel expenses which are incurred in the performance of his official duties. As to those school districts where the county superintendent has no duty to supervise transportation or the preparation of budgets, obviously he could not incur any "necessary traveling expenses" as supervisor of transportation or budget preparation and thus not entitled to any payment. However, so far as the county superintendent is acting in the performance of his official duties he would be entitled to reimbursement for actual and necessary travel expense within the limits of Section 167.270.

If the above information is insufficient to answer the particular questions before you, we will be happy to consider specific questions.

Yours very truly,

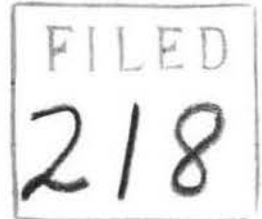
THOMAS F. EAGLETON
Attorney General

LCD:df
Enclosures(2)

BI-STATE DEVELOPMENT AGENCY: The property of the Bi-State
TAXATION: Development Agency, used for
EXEMPTION FROM TAXATION: the well-being, welfare and
CHARITIES: convenience of the Bi-State
CHARITABLE USE OF PROPERTY: Metropolitan Development Dis-
trict, is exempt from taxation.

Opinion No. 218

December 30, 1964



State Tax Commission of Missouri
Jefferson Building
Jefferson City, Missouri

Gentlemen:

You have requested the opinion of this office with respect to whether the real and tangible personal property of the Bi-State Development Agency of the Bi-State Metropolitan Development District, is exempt from taxation under Missouri law.

The Bi-State Metropolitan Development District was established in 1949 by an interstate compact entered into by the states of Missouri and Illinois with the approval of Congress. The district embraces the City of St. Louis and the counties of St. Louis, St. Charles and Jefferson in Missouri, and the counties of Madison, St. Clair and Monroe in Illinois. The object of the compact was to provide for the future planning and development of the district "holding in high trust for the benefit of its people and for the nation the special blessings and advantages thereof".

The compact also created the Bi-State Development Agency as "a body corporate and politic" to make plans for the development of the district and with power to plan, construct, maintain, own and operate bridges, tunnels, airports, and terminal facilities. Section 70.370 RSMo. By subsequent legislation enacted by the two states and with the consent of Congress, the powers of the Bi-State Development Agency were expanded, so that presently the Agency has, inter alia, the power to acquire, construct, operate, and maintain "bridges, tunnels, airports, wharves, docks, warehouses, grain elevators, passenger transportation facilities and air, water, rail, motor vehicles, and other terminal facilities". Section 70.373 RSMo. The original

State Tax Commission of Missouri

compact gave the Bi-State Agency power to charge and collect fees for use of the facilities owned and operated by it.

You have informed us that your question relates primarily to the passenger transportation facilities which have been acquired by the Bi-State Agency from existing utilities and coordinated into one mass transit system for the entire Bi-State Development District. However, our opinion is not necessarily so limited.

Section 137.100, RSMo, enacted pursuant to the authority of Section 6, Article X, of the Constitution, exempts from taxation all property, real and personal, actually and regularly used exclusively for purposes purely charitable and not held for private or corporate profit, with certain exceptions which are not necessary to consider for purposes of this opinion. In our opinion, the mass transit system of the Bi-State Development Agency, to which you have specifically referred, is exempt from taxation under the provisions of Section 137.100 as property used for purposes purely charitable and not held for private or corporate profit.

There was a time when the concept of charitable purposes comprehended little more than the relief of the destitute or the giving of alms. However, our Supreme Court long ago adopted, and has consistently reaffirmed, a broad definition of charity. In Buchanan v. Kennard, 234 Mo. 117, 136, 136 SW 415, the Court held that the Statute of Charitable Uses (43 Eliz. C4) is in force in this state (so that "all the objects named therein are considered charitable"), but that the statute is not the sole test of what is a public charity. Hence, "many other uses, not named, and not within the strict letter of the statute, but which, coming within its spirit, equity and analogy, are considered charitable". Among the charitable uses enumerated in the Statute of 43 Elizabeth are those "for the repair of bridges, ports, havens, sea-banks and highways". The authorities consistently hold that if property is used "for the public convenience", such use is charitable within the spirit of the Statute.

In Bader Realty & Investment Company v. St. Louis Housing Authority, 358 Mo. 747, 217 SW2d 489, the Court stated the applicable principle as follows:

"It has been said that charity 'embraces the improvement and happiness of man' and that 'a charitable use, where neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man.' In re Burrough's Estate, 357 Mo. 10, 206 SW2d 340, 344, * * *"

State Tax Commission of Missouri

In the Restatement of the Law Second, Trusts 2d, the following appears:

"Section 368. What Purposes are Charitable

"Charitable purposes include:

"(e) governmental or municipal purposes;

"(f) other purposes the accomplishment of which is beneficial to the community."

In the comment, referring to the Statute of Charitable Uses (43 Eliz. I, C4), it is said, "The common element of all charitable purposes is that they are designed to accomplish objects which are beneficial to the community".

Section 373 of the Restatement states:

"A trust for the erection or maintenance of public buildings, bridges, streets, highways, parks or other public works or for other governmental or municipal purposes is charitable."

And Section 374 of the Restatement reads:

"A trust for the promotion of purposes which are of a character sufficiently beneficial to the community to justify permitting property to be devoted forever to their accomplishment is charitable."

In Bogert, Trusts and Trustees, Second Edition, Section 378, page 170, it is said:

"Governments (whether national, state or local) have as their objects the furnishing of facilities and services which will make the lives of their citizens comfortable and safe. They carry benefits of a social nature to large groups. Their work is not confined to distributions for the mere financial enrichment of their inhabitants. Trusts for governmental or municipal purposes are therefore charitable. In the Statute of Charitable Uses these trusts were represented by gifts for the repair of bridges, ports, havens, causeways, sea banks, and highways."

And at page 177, the author states:

State Tax Commission of Missouri

"Types of Governmental Benefits

"Examples of charitable trusts of this class are to be found where the purpose of the trust was to furnish to the inhabitants water, light, or gas, at cost or less, or supply other public utility services which are usually or occasionally furnished by municipalities; * * *"

In 4 Scott on Trusts, Second Edition, Section 373, page 2665, the author states the rule in this manner:

"Governmental or municipal purposes

"A trust for the erection or construction or maintenance of public works is charitable. In the Statute of Charitable Uses are included trusts 'for repair of bridges, ports, havens, causeways, churches, sea-banks and highways'. It has been held that a trust for the purpose of supplying the community with these or other facilities, which are usually supplied at the expense of taxpayers, is charitable. Thus the courts have upheld trusts for the erection of a town hall or similar public building; for the construction or repair of highways; for the erection or maintenance of bridges; for the establishment or maintenance of public parks; for the construction of water works; for protection against fire; and the like. * * *"

The Bi-State Development Agency owns and operates for the benefit and welfare of the inhabitants of the Bi-State Metropolitan Development District the mass transit facilities. This is a public purpose which is for the well-being of the inhabitants of the district and essential to the development thereof. See Todd v. Citizens Gas Co. of Indianapolis, 46 F. 2d 855, 865, holding that the establishment and operation of a gas plant was a proper object of a charitable trust.

The fact that in former times such facilities were operated by private companies and in some areas still are, in no wise affects the public character of the use of the property. Private operation for private profit has proved to be inadequate in this area. Public operation of the system, with only the public interest in view, serves to promote the essential interests of all the inhabitants of the district and to make it a better place in which to live and work, in addition to alleviating traffic congestion.

State Tax Commission of Missouri

Other facilities which may be operated by the Bi-State Agency in its proprietary capacity also serve to further the well-being of the community. For example, it is clear that the acquisition and development of land for an airport is a public purpose essential to the prosperity, the health, welfare and safety of the inhabitants of the area. See Dysart v. City of St. Louis, 321 Mo. 514, 11 SW2d 1045. In our judgment, the property devoted to such uses is "used for purposes purely charitable".

Such property is not held for private or corporate profit. On the contrary, it is held for public purposes. The Agency was not created for the purpose of operating any business for profit. Its primary purpose is to further the development of the district for the good and the welfare of the inhabitants thereof. To the extent that any profit may be derived from the operation of the system, such profit is purely incidental, and particularly so since any such profits must be used in furtherance of the primary object of the Agency. See in this connection Missouri Goodwill Industries v. Gruner, Mo. Sup., 210 SW2d 38.

Moreover, we do not believe that under the Compact the Bi-State Development Agency has any power or authority (and clearly it does not intend) to engage in business for profit or to hold its property for that purpose. On the contrary, its property must be devoted to a public use and may be used for public purposes only. Of decisive importance is the fact that the Agency is a public, and not a private, corporation.

In view of the foregoing, and adopting the modern day concept of "charitable purposes", we hold that the property of the Bi-State Development Agency, real and personal, is used exclusively for purposes purely charitable and for such reason is exempt from taxation. The intent of the Legislature that the property of the Agency be exempt from taxation is evidenced by the enactment of Section 70.375, RSMo.

We add the following caveat. Although its property is used for "purposes purely charitable" within the meaning of Article X, Section 6 of the Constitution, the Bi-State Development Agency is not a true charity or charitable institution within the meaning of the doctrine of charitable immunity. The Agency is a public corporation with power to engage in proprietary functions for the common good. Such functions, although in the public interest and beneficial to the community, are businesses in their fundamental nature, and public bodies (such as municipalities) engaged in such activities have always been liable in tort for negligence to the same extent as private operators of similar enterprises. See Adam Hat Stores v. Kansas City, Mo. Sup., 316 SW2d 594, and Riley v. City of Independence, 258 Mo.

State Tax Commission of Missouri

671, 167 SW 1023, 1025. The immunity of true charities and charitable institutions from tort liability is based on grounds of public policy. No such public policy exists for the purpose of immunizing municipal corporations (which would include the Bi-State Development Agency) from liability for torts in respect of their proprietary functions.

CONCLUSION

The property of the Bi-State Development Agency, used for the well-being, welfare and convenience of the Bi-State Metropolitan Development District, is exempt from taxation.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Joseph Nessenfeld.

Yours very truly,

Thomas F. Eagleton
THOMAS F. EAGLETON
Attorney General

JN:rp

Opinion No. 219 Ans. By Letter
(Eichhorst)

July 9, 1964



Mr. John A. Owens
Director of Aviation
Division of Commerce and
Industrial Development
Eighth Floor, Jefferson Building
Jefferson City, Missouri

Dear Mr. Owens:

This is in reply to your letter of June 9, 1964, requesting an opinion from this office which reads in part as follows:

"The city officials of West Plains are now preparing to submit a request for matching funds under the Memorial Airport Act in hopes that an allocation will be made during the next legislative session. The mayor of West Plains desires to use evidence of previous expenditures as the city's share of the matching funds. Several other cities have made similar requests usually desiring to use the value of land already acquired as the community's share on a matching funds basis. I would appreciate your legal opinion of the aforementioned practice under the Memorial Airport Act."

State aid to memorial airports is provided for in Section 305.230, RSMo 1959, which is here set out:

"In appreciation of the services of our gallant armed forces and to perpetuate the memory of their heroic achievements in the war against Germany, Japan and their allies and to promote the advancement of aviation in the name of those who gave their

lives as members of our gallant armed forces in the war against the aforesaid enemies, cities, towns and counties are hereby authorized to purchase sites and construct and operate airfields in such counties or near such cities and towns and to receive free technical advice from the division of resources and development; provided further, that when any city, town or county in Missouri shall certify to the governor that it has appropriated a specific sum for the aforesaid purpose and is ready to proceed with the purchase or construction of such airfields a like sum not exceeding ten thousand dollars shall be allotted to said city, town or county from the appropriation herein made for such purpose but said sum shall be released to such city, town or county only after the division of resources and development has certified to the governor that in their judgment the airfield in question is desirable and in the interest of the development of aviation and that the funds proposed are adequate to complete the project; and, provided further, that cities, towns or counties are hereby authorized to receive federal grants in addition to all other grants or funds made available for such purpose under this section."

From a reading of this section, state aid is only to be forthcoming "when any city, town or county in Missouri shall certify to the governor that it has appropriated a specific sum for the aforesaid purpose and is ready to proceed with the purchase or construction of such airfields". This being so, it is our opinion that a city may not use funds already expended as a basis for a like sum of state aid under Section 305.230, RSMo 1959.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

June 17, 1964



Honorable William G. McCaffree
Prosecuting Attorney of Vernon County
Reed Building
Nevada, Missouri

Dear Mr. McCaffree:

This is in answer to your letter dated June 10, 1964,
in which you request an official opinion from this office.

As you will recall, I discussed the contents of your letter
with you over the telephone several days ago, and I explained
to you that the problem raised in your letter could be easily
resolved.

I called Mr. A. C. Abbott, Supervisor, Safety Responsibility
Unit, and told him that under the factual situation outlined
by you, the covenant not to sue is acceptable under the Safety
Responsibility Act. I feel certain that Mr. Abbott will accept
the covenant not to sue which you had previously sent to him,
and, of course, this should eliminate any problems you may have
had with his office.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

By
Eugene G. Bushmann
Assistant Attorney General

EGB:bjj

cc: Mr. A. C. Abbott

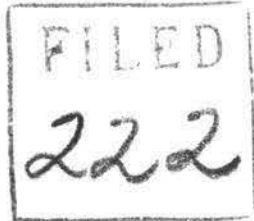
COUNTY BUDGET LAW:
SECOND CLASS COUNTY:
EMERGENCY FUND:
CONTINGENT FUND:

Purchase of real estate for addition to courthouse by second class county may be made out of emergency fund created under Section 50.540, RSMo. Purchase price may be paid over period of years if obligation at time it is incurred does not exceed annual revenue plus unencumbered balances from previous years.

OPINION NO. 222

September 16, 1964

Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri



Dear Mr. Burrell:

From the information you have given us the following appears to be the fact: The County Court of Greene County, a county of the second class, is planning on making an extension to the courthouse, and it is advantageous to acquire real estate contiguous to the present site by purchase. Under Section 49.305, RSMo 1959, a county is authorized to purchase real estate and pay for it out of the "contingent fund". Section 50.540, RSMo, applicable to second class counties, provides for an "emergency fund", and Greene County has provided for no contingent fund but does have an emergency fund under the latter statute. You ask (1) what is the meaning of the words, "Contingent Fund", as found in Section 49.305, and (2) is this wording, "Contingent Fund" synonymous with the "Emergency Fund" found in Section 50.540. We believe the real question to be decided is whether a second class county can spend money to expand the courthouse out of funds in the "emergency fund" provided pursuant to Section 50.540.

You also ask if the county could contract for the purchase of the land for a period of time paying Three to Four Thousand Dollars a year.

Section 49.305 is as follows:

"Sites for courthouse, jail, etc.,
may acquire--funds from which payment

authorized.--The county court of any county may acquire by purchase, for the county, improved or unimproved real estate for a site for a courthouse, jail or poorhouse or infirmary; or, when the county owns the site may acquire by purchase improved or unimproved real estate as an addition to or enlargement of the site. The county court may pay for the real estate acquired out of any money in the county treasury belonging to the contingent fund or out of any surplus in any other fund at the close of any fiscal year, after the payment of all warrants drawn during the year against the fund and of all other previously issued and outstanding warrants against the fund."

It will be noted that the county court may pay for the real estate acquired out of any money in the county treasury belonging to the contingent fund. Section 49.310 provides that a county may "erect and maintain" a courthouse and "may acquire a site, construct, reconstruct, remodel, repair, maintain and equip" said courthouse. The county court may issue bonds as provided by the general law covering the issuance of bonds for said purposes.

Section 50.540 provides that counties of the second class shall maintain an "amount equal to not less than three percent of the total estimated general fund revenues as an 'emergency fund'," and that any time during the year the county court in counties of class two may transfer funds from the emergency fund to any other appropriation upon the recommendation of the budget officer but that said transfer shall be made only for unforeseen emergencies and only upon unanimous vote of the county court.

Reading these two sections together, the question arises, is the "contingent fund", referred to in Section 49.305, and the "emergency fund", referred to in Section 50.540, one and the same fund. We believe that the answer is in the affirmative, and that the money in the "emergency fund" could be used for the purchase of the property in question for the following reasons:

Honorable Don E. Burrell

The designation "contingent fund" and "emergency fund" is frequently used interchangeably. For example, Section 50.680, although referring to counties of the third and fourth classes, provides that the county court shall set aside a fund "for the contingent and emergency expense of the county". These two designations of funds are synonymous and interchangeable.

An "emergency fund" has been defined as being the same as a "reserve fund". *State v. Vandiver* (Mo.), 111 S.W. 911, 1.c. 919: "The term is 'reserve or emergency fund.' The words 'reserve' and 'emergency' are there both used as adjectives qualifying the same noun, and, as such, are convertible terms."

The Supreme Court of Missouri has held that the replacement of road machinery could be made from "contingent and emergency funds". *Everett v. County of Clinton*, 282 S.W. 2d 30. Here, the county court had set up a "contingent and emergency" fund. This fund was used for replacement of road graders. An injunction suit was brought wherein it was claimed that the use of this fund was illegal for the reason that the need for replacement could have been foreseen and was not a "contingency or emergency matter". The court held at 1.c. 42:

"* * * The possible or probable expense for rentals on, or for the purchase price of new motor graders to be leased or purchased, when the county court decided it was necessary to trade in the old ones and get new ones, was a contingent expense. * * *"

This opinion holds that any expenditure, the need for which arises during the year, even though it could have been anticipated is a "contingent or emergency" expenditure and can be made from the county treasury if there is money available.

The courts of this state have used the words, contingent and emergency funds, interchangeably. (*Everett v. County of Clinton*, supra), and they have held that contingent and emergency expenses are to be included in any legitimate expense or lawful expenditure that the

Honorable Don E. Burrell

county is authorized to make if there is actually money in the county treasury available.

The case of State ex rel. v. Cribb (Mo. Sup.), 273 S.W. 2d 246, also holds that funds in other categories may be used for "any lawful purpose" provided "there is actually on hand in cash funds sufficient to pay all claims" in all other classes.

Under the authority of these definitions and the cited law, with reference to construction of courthouses, expenditures made from the contingent fund referred to in Section 49.305 may be made from the emergency fund in Section 50.540.

In answer to your last question concerning the period of time and the method of payment for the acquired property, you may purchase the desired property with payments extending over a period of years provided you do not exceed the restrictions imposed by Article VI, Section 26(a) of the Constitution of Missouri, 1945. This provision is as follows:

"No county * * * shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this constitution."

State ex rel. v. Cribb, supra, states at l.c. 250:

"The object of the constitutional provision, Sec. 26(a) of Article VI, and the 'County Budget Laws,' supra, is to compel counties and municipalities to operate on a cash basis. In other words, the governing body may not obligate the county or municipality in a sum in excess of the revenue provided for any one year. The sum available to be spent in any one year is the revenue provided for that year 'plus any unencumbered balances from previous years.' * * *"

Honorable Don E. Burrell

CONCLUSION

It is the opinion of this office that the purchase of real estate for an addition to the courthouse by a county of the second class may be made as provided for in Section 49.305, RSMo, out of the emergency fund created under Section 50.540, RSMo, provided there is unanimous approval by all of the county judges for such expenditure.

It is further the opinion of this office that the purchase price may be extended over a period of time, provided the obligation at the time it is incurred does not exceed the annual revenue (plus unencumbered balances from previous years), as provided in Section 26(a) of Article VI of the Constitution of Missouri, 1945.

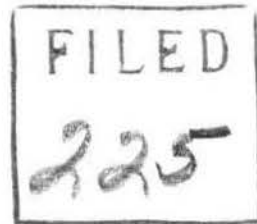
The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

Opinion No. 225 Ans. By Letter
(Randolph)

August 18, 1964



Honorable Gladys B. Stewart
Prosecuting Attorney
Douglas County
Ava, Missouri

Dear Mrs. Stewart:

This letter is in answer to your request for an opinion of this office in regard to whether a local school board can terminate a teacher's contract when he reaches the age of sixty-seven.

Section 169.050, RSMo 1959, governing retirement systems in districts of less than seventy-five thousand population, provides in subsection 1 for compulsory retirement at the age of seventy years. Subsection 2 permits retirement under the age of seventy years in certain circumstances, at the option of the teacher.

Section 163.100, RSMo 1959, states that a school board has no power to dismiss a teacher. It follows that a local school board has no right to terminate a subsisting teacher's contract when he reaches the age of sixty-seven for that reason. However, the board may elect not to re-employ a teacher for the ensuing year pursuant to Section 163.090, RSMo Cum. Supp. 1963, for any reason.

Section 163.090, RSMo Cum. Supp. 1961, provides that a school board shall notify in writing each teacher concerning his re-employment on or before the 15th of April of the year in which the contract then in force expires. A tie vote of the board on re-employment shall constitute employment for the ensuing school year, as will failure of the board to give the required notice. This section does not establish tenure for teachers but contemplates the execution of a new, specific and

Honorable Gladys B. Stewart -2-

distinct contract for each year. State ex rel. Joslin v. School Dist. No. 7 of Jasper County, App., 302 SW2d 497. It follows that if a majority of the whole board votes against re-employing any teacher because he has attained the age of sixty-seven and written notice of the decision not to re-employ is given such teacher on or before April 15th, such action is valid.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

DLR:lt

July 31, 1964



Honorable Paul D. Hess, Jr.
Prosecuting Attorney
Macon County Courthouse
Macon, Missouri

Dear Mr. Hess:

Your request for an opinion of this office reads as follows:

"In a civil case (pertinent to the adoption of a child), wherein a defendant parent is initially represented by employed counsel but has now had filed through such counsel an affidavit stating that such defendant has used all available funds and yet wishes to appeal from the Circuit Court decision and as a poor person to secure a copy or copies of the transcript of record necessary for such appeal, from what source, if any, may funds be secured for payment to the Court Reporter of the transcript copies?"

Section 485.100(2), V.A.M.S. 1949, provided:

". . . any judge may, in his discretion, order a transcript of all or any part of the evidence or oral proceedings for his own use, and the court reporter's fees . . . shall be taxed in the same manner as other costs in the case;"

Section 485.100 V.A.M.S. 1949, was amended in 1955 to provide:

". . . Any judge, in his discretion, may order a transcript of all or any part of the evidence or oral proceedings, and the court reporter's fees for making the same shall be paid by the county, upon a voucher approved by the court, and taxed against the state or county as may be proper. . . ."

Honorable Paul D. Hess, Jr.

The 1955 statute gives the judge discretion in ordering a transcript, to be paid for by the county. This would indicate a legislative intent to broaden the judge's power to order transcripts by dropping the provision of the 1949 statute "for his own use." By the dropping of restrictive words in a statute, the legislative intent is inferred to broaden the effect of the statute. Also, the words are general words in nature and should be liberally construed. Thus, we are of the opinion that a poor civil defendant may properly be allowed a transcript for appeal at the judge's discretion. In addition, the legislature granted discretion in the judge to order a transcript. This indicates the statute is to have broad and comprehensive application.

A related statute, Section 514.040 RSMo 1959, which provides for poor plaintiffs, has been interpreted to allow a free transcript for appeal to poor plaintiffs. State ex rel. LaRue v. Hitchcock, 171 Mo. App. 109, 153 SW 546. Since it is within the judge's discretion to allow the transcript for poor plaintiffs, it would not seem an abuse of discretion to allow poor defendants a transcript for appeal. This case also indicates the long legislative history of Missouri to open their courts to those without financial means. In addition, Section 485.100 specifically allows criminal defendants transcripts for appeals. Thus, in view of Section 485.100 RSMo 1959, and Section 514.040 RSMo 1959 which clearly allows transcripts for appeal to poor plaintiffs and criminal defendants, we do not feel the legislature intended to deny poor defendants the same. These statutes, as a whole, indicate legislative intent to carry out the mandates of Article I, Section 14 of the Constitution of Missouri which provides:

"That the courts of justice shall be open to every person, and certain remedy afforded for every injury to person, property or character, and that right and justice shall be administered without sale, denial or delay."

It is the apparent purpose of the 1955 amendment to include all possible groups and situations so that our courts will be open to all, regardless of financial ability.

In view of the 1955 amendment to Section 485.100 RSMo 1949, allowing a court discretion in ordering transcripts by deleting all restrictive language and Article I, Section 14, of the Missouri Constitution and the related Missouri statutes, we are

Honorable Paul D. Hess, Jr.

of the opinion that a judge may allow a poor civil defendant a transcript for appeal, the cost of which transcript shall be paid by the county.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

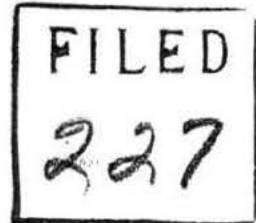
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CHAUFFEURS' LICENSE:
COMPENSATION FOR SERVICES:
REGULAR OPERATION:

A sheet metal worker is not required to have a chauffeur's license to operate his employer's trucks if the trips are so occasional and infrequent that they are not part of the employee's duties.

OPINION NO. 227

August 5, 1964



Honorable Bill D. Burlison
Prosecuting Attorney
Cape Girardeau County
708 Broadway
Cape Girardeau, Missouri 63701

Dear Mr. Burlison:

This is in reply to your opinion request in which you state:

"This is an inquiry in regard to the requirement for a chauffeur's license under Section 302.010 in the following situation.

"A local sheet metal heating and air-conditioning contractor hires from twelve to sixteen men and has one or two pickup trucks. Occasionally if a particular part or piece of material will be needed while this crew is working on a job, one of the sheet metal workers who is most expendable at the time will drive the pickup truck to the parts or supply company, purchase the item needed and return it to the site of construction. This driver is paid for being a sheet metal worker and his trips will be infrequent, as the next time the situation arises a co-worker may very well run the same type of errand.

"Is this driver required to have a chauffeur's license under Section 302.010, V.A.M.S. 1959?"

Honorable Bill D. Burlison

We are of the opinion that the described sheet metal workers are not chauffeurs within the meaning of the statute. Section 302.010, RSMo 1959, provides as follows:

"Definitions.--When used in this chapter the following words and phrases mean:

"(1) 'Chauffeur', an operator who operates a motor vehicle in the transportation of persons or property, and who receives compensation for such service in wages, salary, commission or fare; or who as owner or employee operates a motor vehicle carrying passengers or property for hire; or who regularly operates a commercial motor vehicle of another person in the course of, or as an incident to his employment, but whose principal occupation is not the operating of such motor vehicle;"

This statute sets out three separate definitions for determining who is a chauffeur. It is clear that an operator does not come within the first provision of Section 302.010 unless he operates a motor vehicle in the transportation of persons or property and receives compensation therefor. It was so held in an opinion of this office, No. 88 rendered under date of July 6, 1953 to Stewart E. Tatum, a copy of which opinion we enclose.

Since the stipulated facts indicate that parts are needed only "occasionally" and the drivers are chosen by whoever is "most expendable at the time" and the duty is not assigned to any particular employee and each employee's trips are "infrequent", it is our opinion that a chauffeur's license is not required. It appears that the infrequent driving is not part of the duties and services for which the sheet metal worker is directly compensated.

This construction would seem justified by reference to the third definition in the statute in which the legislature indicates its intent with regard to driving as an "incident of other employment."

A slightly different set of facts may indicate that the workers are more than infrequent drivers on occasional trips or that the duty is assigned or sufficiently fixed that compensation is paid for the service of driving as part of the total

Honorable Bill D. Burlison

employee's duties and a license would be required.

The second statutory definition would not seem involved in your request.


The third definition provides that a chauffeur is one "who regularly operates a commercial vehicle of another person in the course of or as an incident to his employment but whose principal occupation is not the operation of such vehicle." (Emphasis ours.) The sheet metal workers do not come within this definition because they are apparently not "regular" operators. *Friedman v. Maryland Casualty Co.*, 228 Mo.App. 680, 71 SW2d 491 (1934).

CONCLUSION

It is the opinion of this office that sheet metal workers who infrequently use their employer's trucks to pick up needed parts or materials, the worker who can most easily be spared from the job at the time being designated to make such trips, are not required to have a "chauffeur's" license in order to operate such trucks.

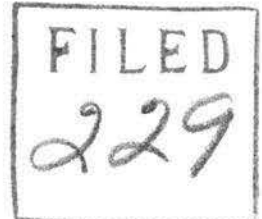
The foregoing opinion, which I hereby approve, was prepared by my assistant, C. B. Burns, Jr.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

Enc.

June 24, 1964



Honorable Robert P. C. Wilson, III
Prosecuting Attorney
Platte County
Platte City, Missouri

Dear Mr. Wilson:

In your letter of June 13, 1964, you request an official opinion of this office. You state as follows:

"Hon. Andrew Jackson Higgins, Judge of the Sixth Judicial Circuit, recently resigned. Judge Higgins had filed for nomination for re-election on the Democratic ticket. He was the only candidate on the Democratic ticket and there was no candidate on the Republican ticket. The resignation occurred after the last day on which a candidate may file for office for the primary election."

Your first question is, "How may the vacancy on the Democratic Party ticket be filled?", and second, "May the Republican Party enter a candidate since they did not have a candidate filed for nomination in the Primary?"

We are enclosing a copy of an official opinion of this office written on September 18, 1956, to Honorable John W. Mitchell, Secretary of the Jackson County Board of Election Commissioners, at Independence, Missouri, which opinion we believe answers your questions.

Honorable Robert P. C. Wilson, III

Section 120.550, RSMo 1959, has several slight changes from the one set out in the opinion, and, therefore, we quote the present section of the statute:

"Party committee to make nominations, when.--1. The party committee of the county, district or state, as the case may be, shall have authority to make nominations in the following cases:

"(1) When a vacancy in the candidates for nomination as a party candidate for election to any office shall occur by reason of death or resignation after the last day in which a person may file as a candidate for nomination;

"(2) When any person nominated as the party candidate for any office shall die or resign before election;

"(3) When a vacancy in office which is to be filled for the unexpired term at the following general election shall occur after the last day in which a person may file as a candidate for nomination.

"2. Nominations to fill vacancies caused by death shall be filed, as the case may be, either with the secretary of state not later than fifteen days before the day fixed by law for the election of the person in nomination or with the election authority not later than ten days before such election. Nominations to fill vacancies caused by resignation or withdrawal of a candidate shall be filed with the secretary of state or election authority not later than thirty days before the day fixed for the election.

"3. No name shall be allowed on the ballot until the required fee has been paid."

Honorable Robert P. C. Wilson, III

You will note that under this statute when a candidate withdraws before the Primary but after the last day for filing as a candidate for nomination, the party committee of the district shall have authority to nominate a candidate. Section 120.800, RSMo 1959, provides that the county committees shall meet and elect a chairman and vice-chairman, one of whom shall be a woman, and that the chairman and vice-chairman of each of the several counties of the Sixth Judicial District would comprise the party committee of that district. Since Judge Higgins was the only candidate and he has withdrawn, the Democratic Judicial Committee of the Sixth Judicial Circuit may nominate a candidate for the office on the Democratic ticket.

The Republican Party cannot make a nomination as no vacancy occurs as a result of "death or resignation" of their candidate.

We call your attention to Section 120.545, RSMo Cum. Supp. 1963, which applies when more than one candidate filed on the same party ticket. This section does not apply here as the candidate that withdrew was the only one filing on that party ticket.

Therefore, pursuant to the provisions of Section 120.550, RSMo, the sole candidate for Circuit Judge having withdrawn after the close of the filing period for the Primary election, the Democratic Judicial Committee may nominate a candidate. Because no elector has filed as a Republican candidate for the office of Circuit Judge, his party committee may not now name a candidate.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

OHS/fh

INSURANCE: Articles of Incorporation of Country-Wide Life
Insurance Company.

Opinion No. 230
~~Answered by Letter~~

July 10, 1964



Mr. Ralph H. Duggins, Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

This opinion is in answer to your letter of June 15, 1964 with which you submitted to this office an exact copy of a Declaration of Intention, including Articles of Incorporation, filed by the original incorporators of the proposed Country-Wide Life Insurance Company. Also forwarded with your letter was a proof of publication of the document referred to as required by Section 376.070, RSMo 1959. Finally, you forwarded to us a copy of a letter addressed to this office on June 4, 1964 from Countryside Casualty Company objecting to the use of the name Country-Wide Life Insurance Company by the proposed company.

I have been in touch with the attorney who represents the proposed company and he informs me that it is their intention, in order to expedite matters and to eliminate any possible objections, to change the name of the proposed company from Country-Wide Life Insurance Company to All American Life Insurance Co.

In terms of the selection of the name of a company, I believe it has been the past practice to pretty much leave same up to your discretion and nothing contained herewith is intended to trespass on your prerogative in this regard. However, insofar as this office is concerned, the proposed change of name is perfectly satisfactory with us and if the name is changed as proposed, we would then deem the Declaration and the Articles of the proposed company to be in compliance with Sections 376.010 to 376.670, RSMo 1959 and not inconsistent with the Constitution and laws of this State and the United States.

Mr. Ralph H. Duggins - 2.

July 10, 1964

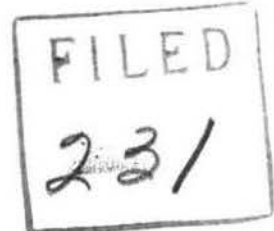
Finally, as was the case with Covenant Security Insurance Company, we do not believe that this change of name necessitates republication and that once you approve the new name, then the charter should be issued in that new name.

Yours very truly,

TFE:oh

THOMAS F. EAGLETON
Attorney General

July 2, 1964



Honorable J. R. Fritz
Prosecuting Attorney
Pettis County Courthouse
Sedalia, Missouri

Dear Mr. Fritz:

You ask if an accused, who has reached the age of seventeen but is not yet twenty-one may waive preliminary hearing on a felony charge in Magistrate Court either when represented by counsel or when not represented by counsel.

Assuming that the accused had not been declared a ward of the Juvenile Court prior to attaining age seventeen, which would necessitate a special hearing before he could be proceeded against at all (§211.071, RSMo 1959), he may be prosecuted as an adult and as such may waive preliminary hearing, whether represented by counsel or not.

Of course, no waiver of preliminary hearing may be considered valid unless the accused knows of the advantage he is surrendering, if any, and does so intelligently. The age and experience of an accused is one of the things which must be considered in determining his capacity to waive any of his rights, *Edwards v. Nash*, 303 SW2d 211.

The basic requirement is that no unjust advantage be taken of the accused which would result in prejudicial matter being obtained and used against him later at trial, *White v. Maryland*, 373 U.S. 59, 10 L.Ed.2d 193. This applies to all persons accused of crime, but extra precaution should be taken where it appears that the youth of an offender may have some bearing on his ability to assess his own needs and make intelligent decisions thereon.

Honorable J. R. Fritz

-2-

We have alluded to this matter in a previous opinion about appointment of counsel to represent the indigent in Magistrate Court (#207, June 21, 1963, to Honorable Robert A. Young), and enclose a copy thereof for your use. The subject of your present inquiry appears beginning on page 6 of that opinion.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

HLM:kd
Enc.

July 13, 1964

Honorable Gladys B. Stewart
Prosecuting Attorney
Douglas County
Ava, Missouri



Dear Mrs. Stewart:

This letter is in response to your requests of June 3, 1964, and June 16, 1964, for information regarding office and travel expenses of the county superintendent of Douglas County. In your letter of June 3, 1964, you inquire:

"The County Court of my county would like to know just exactly what expenses they must pay for the County Superintendent of Schools, particularly in connection with mileage and office. There is only one three-director district in the county and two reorganized grade districts and one reorganized high school district. The last three districts are six-director districts. The court needs to know what, if any, expenses incurred by the County Superintendent of Schools in the six-director districts are expenses they should pay from county revenue."

Your inquiry lacks specificity as to what items of office or travel expense are in question. However, we will attempt to point out some of the laws generally applicable to office and travel expense of the county superintendent of Douglas County. We note that Douglas is a county of fourth class.

As to the office expenses of county superintendents in a fourth class county: Clerical assistance expense is paid by the state up to \$750.00. Amounts over \$750.00 must be paid by

Honorable Gladys B. Stewart

the county. Clerical supplies must be furnished by the county. Section 167.030, RSMo 1959, provides:

" * * * He shall keep his office at the county seat, or at some other place in the county where a court of record is held, and the county court, by order of record, shall designate where the superintendent shall keep his office, and for this purpose the county shall supply him with a suitable room, properly furnished, wherein all records, books, papers, furniture and other property thereto belonging shall be securely kept; and at the expiration of his term of office he shall turn the same over to his successor in good condition, and said county court shall supply the superintendent with all necessary record books, stationery and postage stamps for properly conducting the business of his office, and shall allow all necessary printing of notices and circulars of information, the same to be paid for by warrant drawn upon the county treasurer."

As to mileage and travel expenses of the county superintendent in a fourth class county: As stated in Section 167.270 quoted infra, when a county superintendent furnishes his own conveyance mileage shall be seven cents per each actual and necessary mile traveled. Enclosed herewith is Opinion No. 75 (2-19-48) to James T. Riley which holds that necessary meals and lodging are to be considered as part of travel expense.

Traveling and clerical assistance expenses of county superintendents of fourth class counties are provided for in Section 167.270, RSMo 1959 which states:

"The county superintendent of public schools shall be allowed out of the county treasury not to exceed twenty-five per cent of his annual salary for actual and necessary traveling expenses. The county superintendent of public schools shall be permitted to employ clerical assistance, to whom there shall be paid not less than seven hundred and fifty dollars nor more than one

Honorable Gladys B. Stewart

thousand five hundred dollars annually to be determined and fixed by the county court, seven hundred and fifty dollars of which shall be paid by the state out of the state school moneys, the same to be included by the state board of education as a part of the apportionment made before August thirty-first of each year. The county court shall, upon presentation of his bill properly setting forth his actual and necessary expenditures for traveling expenses draw a warrant upon the county treasury for the payment of same. The county treasurer shall upon presentation of a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent and audited by the county court. draw a warrant each month for payment of same out of moneys provided by the state for such purpose, and the county court shall upon presentation of a proper bill by such clerical employee, or employees, such bill having been approved by the county superintendent, draw a warrant each month upon the county treasury for that part of the compensation for such purpose in excess of that provided by the state; provided, when the county superintendent shall furnish his own conveyance, the rate allowed for mileage shall be seven cents per mile for each mile actually and necessarily traveled; provided further, that all warrants in payment for clerical hire shall be drawn in favor of the person or persons who render such services, and in no case shall the county superintendent personally receive any part thereof."

From your letter it appears you are also concerned with the effect reorganization of school districts has upon the duties and compensations of county superintendents. Enclosed herewith is Opinion No. 56 (4-4-61) to Elva D. Mann. From this opinion you will note the following: The county superintendent has the duty to supervise transportation of only common school districts. Section 167.050, RSMo 1959. He has

Honorable Gladys B. Stewart

no duty to supervise transportation in any other type district. The duty of the county superintendent to supervise the preparation of budgets extends only to districts that do not employ a superintendent who devotes at least one-half of his time to the direct work of supervising. Sections 167.240, 167.040, RSMo 1959.

Your county superintendent is to be paid out of the county treasury for all "actual and necessary traveling expenses". Section 167.270. Generally speaking, your county superintendent is entitled, within the limits of Section 167.270 to actual and necessary travel expenses which are incurred in the performance of his official duties. As to those school districts where the county superintendent has no duty to supervise transportation or the preparation of budgets, obviously he could not incur any "necessary traveling expenses" as supervisor of transportation or budget preparation and thus not entitled to any payment. However, so far as the county superintendent is acting in the performance of his official duties he would be entitled to reimbursement for actual and necessary travel expense within the limits of Section 167.270.

If the above information is insufficient to answer the particular questions before you, we will be happy to consider specific questions.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

LCD:df
Enclosures(2)

July 17, 1964



Honorable William H. Bruce, Jr.
Prosecuting Attorney
Reynolds County Courthouse
Centerville, Missouri

Dear Mr. Bruce:

Your recent request for an opinion of this office
reads as follows:

"(1) When the Board of Equalization
meets and sets a valuation for tax
purposes on a particular tract of land,
how soon thereafter may the County
Assessor change the value thus set by
the board?

"(2) Assuming that the board fixes the
valuation in July and the assessor
changes that figure the following
spring, and the board meets again the
following summer and fixes the valuation
one more time at the board's original
figure, must the owner be notified?"

Your first question asks for the earliest date that
an assessor may "change" the valuation set by the Board
of Equalization.

The assessor is required to make an annual assessment
of property at its true value between the first day of
January and the first day of June. Section 137.115 RSMo.

As assessment is an independent proceeding commencing
on the first day of January each year as provided by Section
137.080 RSMo. See Cupples-Hesse Corp., v. Bannister, 322
SW2d 817 (Mo.).

Honorable William H. Bruce, Jr.

The assessor's jurisdiction to make valuations on property for a particular year terminates when he returns his assessment book to the county clerk pursuant to the statute. See *Wymore v. Markway*, 338 Mo. 46, 89 SW2d 9, 13.

After the assessor has completed his assessment for a particular year, the taxpayer has the right to appeal the amount of the assessment for that year (and that year only) to the County Board of Equalization which meets in July of each year. Sections 138.010 and 138.060 RSMo.

The County Board of Equalization has the power to determine such appeals from the valuation of property made by the assessor and to raise or lower the valuation of property which has not been returned at its true value. Sections 138.050 and 138.060 RSMo.

It is seen from the above that the assessor has no power to change the valuation on a tract of land set by the Board of Equalization for a particular year. However, although the assessor cannot "change" the valuation set by the Board of Equalization for a particular year, the assessor has the duty to assess the property in the county at its true valuation for the following year and every year thereafter. Section 137.115 RSMo. The assessor, in his valuation of the property is not legally bound to assess the property at its valuation for the previous year. The assessor is to value the property at a money value, which in his opinion is the true value of the property as of January 1. This valuation may be the same or higher or lower than the valuation set for the property for the previous year. See enclosed opinion to Honorable Arthur B. Cohn under date of February 28, 1957.

If the assessor should value a piece of property for a particular year at a value which is higher or lower than the valuation set by the Board of Equalization for such piece of property for the prior year, this is not a "change" in the valuation set by the Board of Equalization; this is a new valuation for that piece of property for the particular year that the assessment is being made. This new valuation on the piece of property may be made as early as the first day of January in the year following a valuation on such piece of property by the Board of Equalization. Section 137.115 RSMo.

Your second question concerns notice to the owner of a piece of property of a valuation on that property set by the Board of Equalization at the same valuation as set by the Board for the previous year, but which is set after an intervening "change" in valuation by the assessor in the spring

Honorable William H. Bruce, Jr.

prior to the Board's meeting.

As stated above, this valuation by the assessor in the spring is a new valuation and not a changed valuation. Hence, when the Board of Equalization in July sets the valuation for such piece of property at the same valuation it set on the property for the prior year, after the assessor made a new valuation of such property at a higher or lower value than set for the prior year, it is changing the valuation on that piece of property.

Therefore, if the valuation set by the Board of Equalization is higher than that set by the assessor that spring for that particular year, then the Board is required by Section 138.050 RSMo to give notice of such change to the person owning or controlling the piece of property in question. Section 138.050 RSMo does not require notice when the Board reduces the value of the property below that set by the assessor.

The answer to your first question as to the earliest date that the assessor may change the valuation of a piece of property set by the Board of Equalization is that he may not change the valuation that year but may make a new valuation of the property as of January 1, of the following year.

The answer to your second question regarding notice by the Board of Equalization to a person owning or controlling a piece of property assessed by the assessor in the spring at one valuation and changed by the Board to a different valuation in July, is that Section 138.050 RSMo requires notice of the change in valuation only when the valuation is increased and not when the valuation is reduced.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JDF:df
Enc.

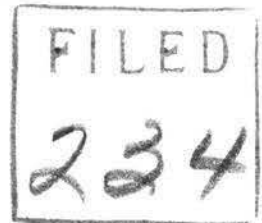
PLANNING AND ZONING:
CONTINUANCE OR DISCONTINUANCE:
CANNOT BE VOTED UPON:
THIRD CLASS COUNTIES:

A proposition as to whether planning and zoning shall be continued or discontinued in third class county of Phelps, cannot be submitted to voters at next general election.

August 19, 1964

Opinion No. 234

Honorable William W. Hoertel
Prosecuting Attorney
Phelps County
Rolla, Missouri



Dear Mr. Hoertel:

This office is in receipt of your request for a legal opinion, which reads in part as follows:

"I would like to know whether or not the County Planning and Zoning law can be re-submitted to the voters in November for reconsideration as to whether or not the people of the County wish to continue with this plan, and if reconsideration is possible, the procedure to follow to lawfully put the question to the voters in the forthcoming general election."

We understand that Phelps County has previously adopted planning and zoning.

The first inquiry is - can a proposition to discontinue planning and zoning be submitted to the voters.

The second inquiry is - if the proposition can be submitted to the voters, what is the procedure for doing so. Obviously the second question depends upon an affirmative answer to the first.

Planning and zoning is a purely statutory procedure, and insofar as second or third class counties are concerned, it can be accomplished only as provided in Sections 64.510 to 64.690, RSMo 1959, as amended. Phelps is a third class county and has adopted planning and zoning pursuant to Section 64.530, RSMo 1959. There is no provision either in Sections 64.510 to 64.690 or elsewhere which authorizes the county to abandon or discontinue planning and zoning.

In the absence of legislative authority, counties are without power the same as though the act or power was expressly forbidden.

In *Lancaster v. County of Atchison*, 180 SW2d 706, 1.c. 708, the Supreme Court en Banc, said:

"* * * counties, like other public corporations, 'can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation - not simply convenient but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' Dillon on Municipal Corporations, 3rd Ed., Section 89. We have repeatedly approved this quotation. See *State ex rel. City of Blue Springs v. McWilliams et al.*, 335 Mo. 816, 74 SW2d 363; *State ex rel. City of Hannibal v. Smith, State Auditor*, 335 Mo. 825, 74 SW2d 367, 372."

The rule is stated in C.J.S., Vol. 20, page 802, that a county "possesses only such powers as are expressly or impliedly conferred upon it by constitutional provisions or legislative enactments. Powers not conferred are just as plainly prohibited as though expressly forbidden.* * *"

In the absence of statutory authority, and procedure for holding an election for the purpose, no election can be held by any second or third class county.

Inasmuch as the answer to the first inquiry is in the negative, it is unnecessary to discuss the second.

Conclusion

Therefore, it is our opinion that a proposition to discontinue

planning and zoning in a second or third class county cannot be submitted to the voters.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Paul N. Chitwood.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

Cross Index Opinion No. 235 (1964)
Opinion No. 1 (1964)
Opinion No. 434 (1963)
Answered by Letter (1 question)

June 19, 1964



Honorable Frank Conley
Prosecuting Attorney
Boone County
Columbia, Missouri

Dear Mr. Conley:

This is in answer to your request for an opinion concerning the bond of the administrator of the Boone County Hospital.

Your question is as follows:

"It has been determined that a blanket bond covering all employees and the administrator can be obtained for about the same amount of premium as would be required for a bond covering all employees except the administrator. The statutes now in force provide that the administrator of the hospital must provide his own bond at his own expense. Since he can be included at very little additional charge on the blanket bond covering all hospital employees, can the hospital board include the administrator in the blanket bond without any cost to the administrator, or without a cost of more than the difference of what the administrator's bond alone would cost as compared to the cost of bonding all employees?"

June 19, 1964

Section 205.190-4 RSMo. 1963 Supp. provides:

"* * * The board shall provide by regulation for the bonding of the superintendent or matron and may require a bond of the secretary of the board and of any employee of the hospital as they deem necessary. The costs of all bonds required, except that required of the superintendent or matron, shall be paid out of the hospital fund. * * *"

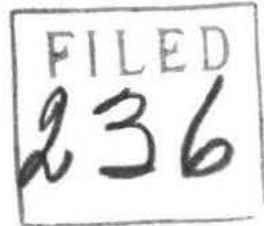
The statute requires that the superintendent or matron be bonded. It authorizes the board, in its discretion, to bond the secretary of the board and any other employee of the hospital. It directs that the costs of the bonds required by the board shall be paid from hospital funds. The language then contains the provision "except that required of the superintendent * * *". This language does not expressly say that the hospital may not pay the premiums on the bond of the superintendent or matron but it does imply that hospital funds may not be used to pay premiums on the bond of the superintendent. The legislative intent appears to be that the cost of the bond for the superintendent or matron cannot be paid out of hospital funds.

The real problem is whether the superintendent or matron can be included in the blanket bond and can reimburse the hospital fund the difference in the premium when the superintendent or matron is included and when he is not. When this act was passed by the legislature, it was well aware of the quite common use of blanket bonds and the cost elements involved. If the legislature had intended that the superintendent or matron might be included in a blanket bond and might reimburse the hospital for the excess cost thereof, some suitable language to convey that intent would have been used. We think the legislative intent was that the superintendent or matron should be required to procure a separate bond and himself pay the cost thereof.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

October 12, 1964



Honorable Lon J. Levvis
Prosecuting Attorney
Audrain County
Courthouse
Mexico, Missouri

Dear Mr. Levvis:

This letter is written in response to your letters of request for an official opinion dated June 18, 1964, and June 24, 1964, relating to claims against the County Clerk, the County Assessor, and former County Coroners as determined by the State Auditor.

We wish to express to you our views and comments respecting the problems presented.

1. We are of the view that the Prosecuting Attorney is not such an interested party as to disqualify him from acting on behalf of the county in determining the legal questions which are presented.

2. We do, however, understand that for a variety of personal reasons the Prosecuting Attorney may prefer not to act in the matter and may wish to decline to act on behalf of the county in the matter. If the Prosecuting Attorney does decline to act, the County Court could employ special counsel under the provisions of Section 56.250, RSMo 1959, to represent the county in this matter. We are enclosing an opinion issued by the Attorney General under date of May 28, 1957, to Alden S. Lance, which discusses the authority of the County Court under such section.

Honorable Lon J. Levvis

3. With respect to the questions of liability of the officers and the application of the appropriate statute of limitations, we believe that the courts should determine these questions. The State Auditor, at the time of the audit, made his determination of these questions and if the officers involved questioned the correctness of that determination, then we think the courts should make the final determination of these legal questions. We note, however, in passing, that if the officers involved, or their successors, are continuing to claim fees contrary to the determination of the State Auditor, then there could be liability thereon up to the present time. This, we think, presents a ripe issue for determination by the courts, either by suits against the officers for recovery or by declaratory judgment actions.

We hope this adequately explains our views regarding the matters presented.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:10

Enclosure

July 2, 1964



Mr. Robert C. Simonds
Director, Planning Section
Division of Commerce and
Industrial Development
Eighth Floor, Jefferson Building
Jefferson City, Missouri

Dear Mr. Simonds:

This is in reply to your recent letter which states
in part as follows:

"1. Your opinion is hereby requested
as to the authority of this Division
to contract with and make payment to
the Kansas Industrial Development
Commission for the joint development and
ownership of an educational film on
comprehensive planning in small com-
munities."

The state Division of Commerce and Industrial Development,
as successor to the Division of Resources and Development,
under Section 255.140, RSMo 1959, is the planning agency for
local areas. This section is here set out:

"The state division of resources and
development is hereby designated as
the official state planning agency
for the purpose of providing planning
assistance to counties, municipalities
and metropolitan planning areas, and
for such purposes is hereby authorized
and empowered to:

"(1) Contract with public agencies or
private persons or organizations for
any of the purposes of sections 255.130
to 255.150;

July 2, 1964

"(2) Delegate any of its functions to any other state agency authorized to perform such functions, except that responsibility for such functions shall remain solely with the division;

"(3) Require or receive reimbursement from any political subdivision or subdivisions receiving assistance under sections 255.130 to 255.150 for the actual costs of the planning assistance or planning work, except that no reimbursement shall be required or received for such costs to the extent that such costs are covered by federal grants and as further provided by sections 255.130 to 255.150 or amendments hereto." (emphasis supplied)

Thus, the Division is authorized to contract with a public agency to implement the local planning program. The suggested educational film would certainly be within the purposes of sections 255.130 to 255.150, RSMo 1959. Also, there being no specific prohibitions, the state of Kansas, and the Kansas Industrial Development Commission, thereof, would be "public agencies" as that term is used.

It is our belief that the Division does have the authority to contract with and make payment to the Kansas Industrial Development Commission for the joint development and ownership of an educational film on comprehensive planning in small communities.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CORPORATE DIRECTORS: In all elections for the Board of Directors, voting shareholders are entitled to vote cumulatively for all directors to be elected and the Articles of Incorporation (or amendments), may not limit such voters to the election of only a certain number of directors.

CUMULATIVE VOTING:

OPINION NO. 238

August 24, 1964

FILED
238

Mr. Paul A. Slicer, Jr.
Corporation Counsel
Office of Secretary of State
Jefferson City, Missouri

Dear Mr. Slicer:

Your official opinion request of June 19, 1964, raises the following question relating to a corporation organized under the provisions of Chapter 351, RSMo.

May the Articles of Incorporation (or amendments) provide that each of two classes of voting stock shall elect one-half of the directors of a six-member board of directors, regardless of the number of voting shares in each class of stock?

Article XI, Section 6 of the Missouri Constitution provides:

"In all elections for directors or managers of any corporation, each shareholder shall have the right to cast as many votes in the aggregate as shall equal the number of shares held by him, multiplied by the number of directors or managers to be elected, and may cast the whole number of votes, either in person or proxy for one candidate, or distribute such votes among two or more candidates; and such directors or managers shall not be elected in any other manner; provided, that this section shall not apply to co-operative associations, societies or exchanges organized under the law."

Section 351.245, RSMo 1959, has substantially similar provisions. The shareholders right to "distribute such votes

among two or more candidates" clearly means that each voting shareholder has a right to vote cumulatively for any or all directors to be elected and to have those votes counted.

The placing of limitations on the number of directors a class of stock may elect would completely ignore the number of votes within that class of stock and prevent the distribution of such votes as each shareholder desired. This is contrary to Article XI, Section 6 of the Constitution of Missouri, which clearly provides that shareholders may vote for all directors to be elected. In addition, the shareholders of a particular class might thereby be given voting power disproportionate to the number of votes to which such shareholders are entitled under the Constitution. On the other hand, the shareholders might be precluded from exercising their full voting power under the Constitution by not having their votes counted cumulatively towards the election of all directors. Under the Constitution, shareholders entitled to vote do so as shareholders of the corporation and not as members of a particular class of stock. Therefore, we are of the opinion that the Articles of Incorporation (or amendments), which would arbitrarily limit the voting rights of a particular class of voting stock to the election of one-half of the directors is inconsistent with our constitutional provision of cumulative voting.

CONCLUSION

In all elections for the Board of Directors of a corporation organized under the provisions of Chapter 351, RSMo., the voting shareholders are entitled to vote cumulatively for all directors to be elected and the Articles of Incorporation (or amendments) may not limit such voters to the elections of only a certain number of directors.

The foregoing opinion which I hereby approve was prepared by my Assistant, C. B. Burns, Jr.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

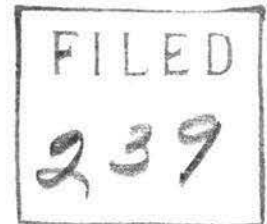
CORPORATIONS:
ARTICLES OF INCORPORATION:
CHARTERS:
PROBATE COURT:
EXECUTORS:
ADMINISTRATORS:
ADMINISTRATION:
WILLS:

Executors named in will may as natural persons become incorporators of a corporation to carry on the business of decedent by order of the Probate Court under Section 473.300.

AUGUST 3, 1964

OPINION NO. 239

Honorable Warren E. Hearnese
Secretary of State
State Capitol Building
Jefferson City, Missouri



Dear Mr. Hearnese:

This opinion is rendered in reply to your letter of June 19, 1964, reading as follows:

"Please find enclosed herewith copy of proposed Articles of Incorporation and copy of Probate Court Order in regard to same as received by this office under recent date.

"Pursuant to same, we respectfully request an opinion of your office as to whether an Executor acting in the capacity of an Executor can act as an incorporator under the provisions of Chapter 351, R.S.Mo. See specifically Section 351.050, as amended 1961, and Section 473.300(1)."

A review of Articles of Incorporation of the proposed Unique Art Glass Co. discloses that the corporation is to be formed for the specific purposes authorized by Section 473.300, RSMo 1959, and that the co-executors who are serving as original incorporators of the proposed corporation are natural persons as required by Section 351.050, RSMo 1959.

Honorable Warren E. Hearnese

CONCLUSION

It is the opinion of this office that executors named in a last will and testament, as natural persons, may become original incorporators of a corporation to carry on the business of decedent upon order of the Probate Court duly entered pursuant to Section 473.300, RSMo 1959.

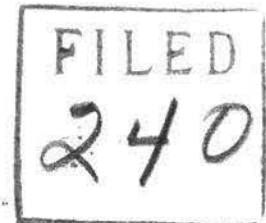
The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Yours very truly,

Thomas F. Eagleton

THOMAS F. EAGLETON
Attorney General

July 8, 1964



Mr. Charles W. Kunderer
Assistant Prosecuting Attorney
City of St. Louis
Municipal Courts Building
St. Louis, Missouri

Dear Mr. Kunderer:

In your letter of June 22, 1964, relative to aid to dependent children, you state the St. Louis Welfare Office has recently sent a case to the Prosecuting Attorney's office in which the mother claims two different men is the putative father and, secondly, you ask if it is necessary for the Welfare Department to refer cases where the paternity cannot be proved or is questionable, for example, where the mother has several children born out of wedlock and fathered by different men.

In our telephone conversation of June 24, you stated that you had a great number of applicants for aid referred to you by the welfare office in St. Louis, numbering from 85 to 100 a day, and that you question whether it was necessary for the welfare office to send these women back every few months.

Section 559.350, RSMo 1959, provides that if any man shall without good cause fail, neglect or refuse to provide adequately for his children born in or out of wedlock, he shall, upon conviction, be punished by not more than one year in the county jail or by fine not exceeding \$1000 or both.

Page Two
Mr. Charles W. Kunderer
July 8, 1964

Section 208.040, RSMo 1959, provides that aid to dependent children shall be granted where the child has been deprived of parental support under certain conditions. It further provides that the Division of Welfare "shall, as a condition to granting benefits require the claimant to initiate or prosecute legal proceedings against the defaulting parent to secure support for said child, or through its investigation determine the claimant has in good faith informed and assisted the proper authorities and made all reasonable efforts to apprehend the parent and charge him with the support of said child."

This charges the Welfare Department to make an investigation and to see that the claimant has aided and assisted the prosecuting attorney in the apprehension of the delinquent father. We point out that this is a "condition to granting of benefits."

Further, this section provides that when a report is made to the prosecuting attorney of the desertion or non-support of the child for whom benefits are sought, and the whereabouts of the defaulting parent is known or can be ascertained, it shall be the duty of the prosecuting attorney to fully investigate all the facts and institute such action as he deems necessary.

Again, we wish to point out that it is the duty of the Welfare Department to report the facts to the prosecuting attorney and the prosecutor in turn must investigate the facts and file charges if he deems it necessary.

The section (Section 208.040) further states that if the prosecuting attorney determines that an action shall not be instituted, a report of his findings and the reason therefor shall be made to the Division of Welfare.

It is to be seen that in all cases where charges are not filed, the prosecutor must set forth the reason and a report of his investigation must be made to the Division of Welfare.

Page Three

Mr. Charles W. Kunderer

July 8, 1964

A reading of this statute makes clear that before the Welfare Department can make any payments they must make an investigation, refer the matter to the prosecuting attorney, and that the prosecuting attorney must make an investigation, but that it is up to the prosecuting attorney to determine whether or not charges should be filed.

With reference to the problem of two alleged fathers, this would appear to be a situation where investigation would appear to be important in an effort to determine who is the defaulting parent. Very often the investigation by the prosecuting attorney will obtain an admission of paternity by the defaulting parent or evidence sufficient to submit the issue to the court.

As to the Welfare Department referring the matter to the prosecutor more than once, it would appear that if their investigation discloses any change of condition or where facts have been discovered changing the situation, or where it is a new application for aid, it is the department's duty to refer or re-refer the claimant to the prosecuting attorney.

We have outlined our interpretation of the law and the proper procedure thereunder, and we trust that this information will be of some benefit to you in the future.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

OHS/BJ/fh

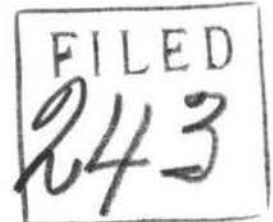
NURSING HOMES:
NURSING HOME DISTRICTS:
COUNTY COURT:
INDIGENTS:

Nursing home districts have authority to prescribe reasonable fees as a prerequisite to admission to nursing homes operated by the nursing home district and the obligation to support indigent poor persons who are residents in the county is still an obligation of the county court or other persons or agencies having a statutory duty of support and such support is not an obligation of the nursing home district.

December 4, 1964

OPINION NO. 243

Honorable Paul D. Hess, Jr.
Prosecuting Attorney
Macon County Courthouse
Macon, Missouri



Dear Mr. Hess:

In your request for an official opinion from this office you have inquired as to whether directors of a nursing home district have any legal obligation to accept persons who cannot pay the reasonable fees established pursuant to Section 198.300, RSMo Cum. Supp. 1963. As we understand your inquiry, you want to know whether the nursing home district must accept indigents if the pertinent "reasonable fees", established by the directors, are paid for the applicant by friends or by the county court from funds available under Section 205.670 RSMo 1959.

We believe that the following statutory provisions from Section 198.300 RSMo. Cum. Supp. 1963, are applicable to the question as to the obligations and authority of a nursing home district:

"1. A nursing home district shall have and exercise the following governmental powers, and all other powers incidental, necessary, convenient or desirable to carry out and effectuate the express powers:

"(1) To establish and maintain a nursing home within its corporate limits and to construct, acquire, develop, expand, extend and improve the nursing home;

* * * * *

Honorable Paul D. Hess, Jr.

"(3) To operate, maintain and manage the nursing home, and to make and enter into contracts for the use, operation or management of and to provide rules and regulations for the operation, management or use of the nursing home;

"(4) To fix, charge and collect reasonable fees and compensation for the use or occupancy of the nursing home or any part thereof, and for nursing care, medicine, attendance, or other services furnished by the nursing home, according to the rules and regulations prescribed by the board from time to time;

* * * * *

"(7) To maintain the nursing home for the benefit of the inhabitants of the area comprising the district regardless of race, creed or color, and to adopt such reasonable rules and regulations as may be necessary to render the use of the nursing home of the greatest benefit to the greatest number; to exclude from the use of the nursing home all persons who willfully disregard any of the rules and regulations so established; to extend the privileges and use of the nursing home to persons residing outside the area of the district upon such terms and conditions as the board of directors prescribes by its rules and regulations;

* * * * *

"2. The use of any nursing home of a district shall be subject to the reasonable regulation and control of the district and upon such reasonable terms and conditions as shall be established by its board of directors.

"3. A regulatory ordinance of a district adopted under any provision of this section may provide for a suspension or revocation of any rights or privileges within the control of the district for a violation of any regulatory ordinance."

(All emphasis added)

Honorable Paul D. Hess, Jr.

We believe that the above statutory provisions explicitly indicate that the nursing home district has authority to make reasonable rules and regulations and establish a reasonable schedule of fees and provide that the payment of these fees shall be a prerequisite for admission to the home as a patient. We believe that the source of funds for the applicant's payment is immaterial so long as they meet the standard of being reasonable fees as prescribed by the nursing home district, and such fees could be paid by the county court where the indigent applicant resided. In this connection it should be noted that under Section 205.590, RSMo 1959, and other related statutory provisions, the county court has certain duties and obligations in connection with supporting or caring for the indigent residents of their county. Chapter 198, RSMo. Cum. Supp. 1963, relating to the formation and operation of nursing home districts, does not create such an obligation on behalf of the nursing home district.


We have concluded from studying your inquiry that you do not mean to inquire as to whether the nursing home district may, in the exercise of reasonable discretion, permit the use of the facilities involved by indigents without the payment of fees. Since we have reached this conclusion it is obvious that such question would not be one upon which the county court would be required to rule. In other words, the making of this decision would not be a county function. We realize that you are conscientiously trying to develop an effective mechanism for meeting the difficult challenge of providing adequate facilities for our aged citizens but we feel compelled to refrain from ruling as to this question for the reasons noted.

CONCLUSION

Therefore, it is the opinion of this office that nursing home districts have authority to prescribe reasonable fees as a prerequisite to admission to nursing homes operated by the nursing home district and that the obligation to support indigent poor persons who are residents in the county is still an obligation of the county court or other persons or agencies having a statutory duty of support and such support is not an obligation of the nursing home district.

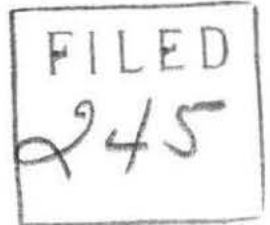
The foregoing opinion, which I hereby approve, was prepared by my assistant, Clyde Burch.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

Opinion No. 245
Answered by letter

July 17, 1964



Honorable Charles P. Moll
Prosecuting Attorney
Franklin County
Union, Missouri

Dear Mr. Moll:

This letter is in response to yours of June 26, 1964,
wherein you pose the following questions:

"From whom are Absentee Ballots to
be obtained in a Consolidated School
District Election? How soon before
such an election may they be obtained?
Are said absentee ballots to be marked
with ink or indelible pencil to be a
proper ballot?

As to your first question, from whom are absentee ballots
to be obtained? Section 112.020, RSMo 1959, provides applica-
tion for an absentee ballot is to be made "in person, or by
mail, to the county clerk, or, where existing, to the board of
election commissioners, or other officer or officers charged
with the duty of furnishing ballots for the election in his
voting precinct * * *." Therefore absentee ballots should be
obtained from the school officer who is charged with furnishing
the regular ballots.

As to your second question, how soon before the election
may they be obtained? Section 112.020 provides that "absentee
ballots may be obtained within thirty days next before the date
of the election and up to six o'clock p.m. on the day before
any election." Some school elections may be held with less
than thirty days notice. In such cases Section 112.020 must be
applied in substance but not in letter. In State v. Holman, Mo.,
349 SW2d 945, 949, the Missouri Supreme Court held the 30 day
requirement of Section 112.020 to be directory and not mandatory.

Honorable Charles P. Moll

-2-

As to your third question, are absentee ballots to be marked with ink or indelible pencil? Section 112.050 which sets forth the procedure for marking an absentee ballot makes no requirement as to the instruments of marking the ballot. We also note the absence of such requirements in Section 111.580 which sets out the method of preparing a regular ballot. We are not aware of any requirement that the voter must mark an absentee ballot with ink or indelible pencil.

No inquiry is made and we do not address the question of what school elections are within the terms of Chapter 112. For your information we are enclosing our opinions No. 4 (6-8-51) to Earl A. Baer and No. 20 (6-19-53) to Robert E. Crist.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

TFE/LCD:dg

encl.

July 29, 1964



Dr. Ben Morton
Executive Director
Commission on Higher Education
Room 130-B, Capitol Building
Jefferson City, Missouri

Dear Dr. Morton:

This is in answer to your letter dated June 30, 1964,
requesting an opinion which reads as follows:

"At the direction of and for the Missouri
Commission on Higher Education I am re-
questing an opinion.

"May boards of regents of state colleges
(in Missouri) use public monies for the
purpose of employing independent, expert
personnel to prepare periodic reports of
information necessary for the administra-
tion of their institutions according to
recognized standards of college administra-
tion?"

Like other corporations and other state agencies, a
state college has only those powers granted to it by statute
together with the implied or incidental power to do whatever
is reasonably necessary to effectuate its expressly granted
powers and to accomplish the purposes for which it was formed,
55 Am. Jur., Section 5.

To determine what powers the legislature has granted
state colleges, we must look to Chapter 174 RSMo 1959. Section
174.040, dealing with the board of regents and their general
powers reads as follows:

Dr. Ben Morton, Executive Director

"Board of regents, * * * and by their respective names they shall have perpetual succession, with power to

"(1) Sue and be sued;

"(2) Complain and defend in all courts;

"(3) Take, purchase, and hold real estate, and sell and convey or otherwise dispose of the same;

"(4) Condemn and appropriate real estate or other property, or any interest therein, for any public purpose within the scope of its organization, in the same manner and with like effect as is provided in chapter 523, RSMo, relating to the appropriation and valuation of lands taken for telegraph, telephone, gravel and plank or railroad purposes; and

"(5) Make and use a common seal and to alter the same."

Section 174.120 provides that the state colleges are under the general control and management of the boards of regents.

"Each state teachers college shall be under the general control and management of its board of regents, and the board shall possess full power and authority to adopt all needful rules and regulations for the guidance and supervision of the conduct of all students while enrolled as such; to enforce obedience to the rules; to invest the faculty with the power to suspend, or expel any student for disobedience to the rules, or for any contumacy, insubordination, dishonesty, drunkenness or immoral conduct; to appoint and dismiss all officers and teachers; to direct the course of instruction; to designate the textbooks

Dr. Ben Morton, Executive Director

to be used; to direct what reports shall be made; to appoint a treasurer for such college, and to determine the amount of his bond, which shall be in amount not less than ten thousand dollars; and to have the entire management of the college, including qualifications for admission."

The primary rule in construing statutes is to ascertain and give effect to legislative intent. *Laclede Gas Co. v. City of St. Louis*, 253 S.W. 2d 832.

The legislature has by the above statutes conferred the task of accomplishing certain objects and imposed duties to be performed upon the board of regents as stated in 14 C.J.S., Section 18, " * * * such boards ordinarily have implied power to do everything necessary and convenient to accomplish the objects of the institutions and not prohibited by law." Authority to employ independent expert personnel to prepare reports of information necessary for the administration of state colleges is a necessary power the boards of regents should possess to accomplish the obligations imposed by statute.

It is therefore the opinion of this office that the boards of regents of state colleges may employ independent expert personnel to prepare periodic reports of information necessary for the administration of their institutions according to recognized standards of college administration.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

GT:aa/df

Opinion No. 250

Answered by Letter - Randolph

July 1, 1964



H. M. Hardwicke, M. D.
Acting Director
Division of Health
State Office Building
Jefferson City, Missouri

Dear Dr. Hardwicke:

This office has been asked to advise the Division of Health with respect to two questions arising under United States Public Law 88-164, 42 USC 2661, et seq., concerning mental retardation facilities construction.

This Federal statute requires that a single state agency must be designated by a state plan as the sole agency for the administration of the plan, or such plan must designate such agency as the sole agency for supervising the administration of the plan, and, further, to provide minimum standards for the maintenance and operation of the facilities which receive Federal aid thereunder, and that a State Advisory Council shall be designated, to include representatives of state agencies concerned with planning, operation or utilization of facilities for mentally retarded and community mental health centers and those government organizations concerned with education, employment, rehabilitation, welfare and health, including representatives of consumers of the services provided.

The first question that arises is whether Section 192.240, RSMo. 1959, designating the number and composition of the State Advisory Council, permits enlargement and inclusion of representatives required for the Advisory Council under Public Law 88-164, and, if not, can such a council be otherwise set up?

July 1, 1964

A second question is, since the Division of Health has been designated as the state agency to receive Federal funds under Public Law 88-164, does the Division of Health have jurisdiction to establish and maintain minimum standards of operation and maintenance of facilities receiving aid under this Act, including hospitals operated by another state agency?

The views expressed in this letter are confined to the implementation of Title I of Public Law 88-164, concerning the construction of research centers and facilities for the mentally retarded and Title II thereof concerned with the construction of community mental health centers.

The Constitution of Missouri, Article III, Section 38(a), states:

" * * * Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."

Public Law 88-164, Title I, Part C, Section 134 (42 USC 2674), covering research centers and facilities for the mentally retarded, states:

" * * * any State desiring to take advantage of this part shall submit a State plan for carrying out its purposes. Such State plan must--

"(1) designate a single State agency as the sole agency for the administration of the plan, or designate such agency as the sole agency for supervising the administration of the plan;"

July 1, 1964

Public Law 88-164, Title II, Section 204 (42 USC 2684), covering construction of community mental health centers, states:

" * * * any State desiring to take advantage of this title shall submit a State plan for carrying out its purposes. Such State plan must--

"(1) designate a single State agency as the sole agency for the administration of the plan, or designate such agency as the sole agency for supervising the administration of the plan;"

Both Sections 2674 and 2684 of Title 42 USC require that the state plans thereunder "provide for the designation of a State advisory council which shall include representatives of State agencies concerned with planning, operation, or utilization of facilities for the mentally retarded and of nongovernment organizations or groups concerned with education, employment, rehabilitation, welfare, and health, and including representatives of consumers of the services provided by such facilities".

Section 192.240, RSMo 1959, provides as follows:

"There is hereby created a State Advisory Council of seven members, who shall be appointed by the governor by and with the advice and consent of the senate. Each member of the state advisory council shall serve for a term of two years from and after his or her appointment and confirmation. Said advisory council shall be composed of citizens of this state who have resided in this state not less than five years immediately prior to their appointment and shall include at least two representatives of the consumers of hospital service, with the other members representing state government and non-government organizations in the state which are familiar with the needs of health services in urban and rural areas of the state. The members of this council may not receive any compensation other than for actual travel and subsistence when acting officially as members of the advisory council. The advisory council

shall be empowered to consult with the division of health on the official state plan for the construction of additional hospital and health center facilities. The director of health will approve such applications for federal assistance in the construction of hospitals and health centers as may be considered advisable after consultation with the advisory council."

It seems likely that the Governor could appoint to the State Advisory Council under Section 192.240 all those categories of persons described in the above quoted language in the Federal Act. That is to say, "members representing state government and non-government organizations in the state which are familiar with the needs of health services in urban and rural areas of the state" (quoted from the State statute) could very well be "representatives of State agencies concerned with planning, operation, or utilization of facilities for the mentally retarded and of nongovernment organizations or groups concerned with education, employment, rehabilitation, welfare, and health" (quoted from the Federal Act).

Likewise, "at least two representatives of the consumers of hospital service" (from the State statute) could include "representatives of consumers of the services provided by such facilities" (from the Federal Act).

However, the fact would have to be established that the present State Advisory Council, as presently constituted or as modified by the Governor by appointments and removals, actually conforms to the requirements of the advisory councils described in Title I and Title II of Public Law 88-164. A letter from the Governor to the effect that the council includes members of the types described would be sufficient.

On the matter of the authority of the Division of Health in the premises, we quote Section 192.025, RSMo. 1959:

"The division of health of the state department of public health and welfare is hereby designated the official agency of the state of Missouri to

receive federal funds for health purposes. The division shall comply with the acts of congress and with any rules and conditions made by any federal agency in regard to the use and distribution of such funds. Such funds shall be deposited in the state treasury and kept in such separately designated funds as may be required to carry out the purposes for which the federal grants are made. Disbursements of such funds from the treasury shall be made on warrants duly issued on requisitions of the division. The general assembly shall appropriate such funds to the use of the division for such purposes."

Section 192.250, RSMo. 1959, reads:

"The division of health of the department of public health and welfare is hereby designated the official state agency to receive any and all federal and other grants and aids for making a survey and for the construction of hospitals and health centers, provided, that private grants and aids to private hospitals, health centers and units in this state, by will, deed or gift shall vest in such private institutions under the terms and provisions of such will, deed or gift and the division of health of the department of public health and welfare shall have no right, title, interest or control over grants and aids to private hospitals so granted, unless granted in said will, deed or gift. It shall be empowered to receive any and all such grants and aids under the terms of such grants and aids and to pay them out under any and all provisions as may be attached to such grants and aids. It shall be authorized to render such reports as may be required under any and all grants and aids;

July 1, 1964

provide such minimum standards for maintenance and operation of hospitals and health centers as may be required under the terms of such grants and aids; and to require compliance with such standards in the case of hospitals and health centers which shall have received such grants and aids." (Emphasis added)

Section 192.250 is broad enough to include cooperation with the Federal authorities and conformity with Public Law 88-164, including Federal requirements of minimum standards of operation and maintenance of facilities receiving aid under the Mental Retardation Facilities Construction Program, regardless of whether such facilities are operated by the Division of Health, the Division of Mental Diseases, or any other public or private agency.

This office advises that the State Advisory Council conforms to the requirements of Public Law 88-164.

We further advise that the Division of Health, as the State agency implementing Public Law 88-164, has jurisdiction to establish and maintain minimum standards of operation and maintenance of facilities receiving aid under that act, including hospitals operated by other state agencies.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

INSURANCE: Articles of Incorporation of Great Heritage Life
Insurance Company.

Opinion No. 253

July 7, 1964

FILED

253

Honorable Ralph H. Duggins
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

This opinion is in answer to your letter of July 1, 1964, with which you submitted to this office an executed copy of Declaration of Intention, including Articles of Incorporation, of original incorporators of the proposed Great Heritage Life Insurance Company. Also forwarded by you was proof of publication of the documents mentioned as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph of this letter has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Sections 376.010 to 376.670, RSMo 1959, as amended, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

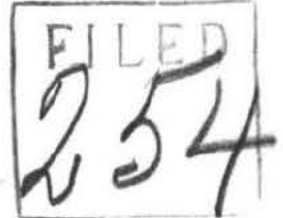
JLO/dg

ROAD DISTRICTS:
SPECIAL ROAD DISTRICTS:
GENERAL ROAD DISTRICTS:
ELECTIONS:
SPECIAL ELECTIONS:

A proposition to levy an additional road tax in accordance with Section 137.565, RSMo 1959, may be held in a general road district on the same day and in connection with a general election.

November 23, 1964.

OPINION NO. 254



Honorable Earl L. Veatch,
Prosecuting Attorney
Lewis County
Monticello, Missouri

Dear Mr. Veatch:

You have requested a legal opinion from this office upon the following questions:

"1. Lewis County has four special road districts within its boundaries. The balance of the county consists of one general district. Can a special election be held in this one general road district to vote on a proposition to levy an additional road tax in accordance with Sec. 137.565, Missouri Revised Statutes, 1959?

"2. May such a special election be held at the same time and in connection with the general election in November, using the same judges and clerks as those who serve at such general election.?"

Section 137.565, RSMo 1959, reads as follows:

"Whenever ten or more qualified voters and taxpayers residing in any general or special road district in any county in this state shall petition the county court of the county in which such district is located, asking that such court call an election in such district for the purpose of voting for or against the levy of the tax provided for in the second sentence of the first paragraph of section 12 of article X of the Constitution of Missouri, it shall be the duty of the county court, upon the filing of such petition, to call such election forthwith to be held within twenty days from the date of filing such petition.

The petition so filed shall set out the duration of the tax to be levied in a period of one, two, three or four years and the ballot to be used for voting shall specify the number of years duration of the tax levy, but in no event shall the duration of the tax levy be for a period of more than four years. Such call shall be made by an order entered of record setting forth the date and place of holding such election, the manner of voting and the rate of tax the court will levy, which rate shall not exceed thirty-five cents on the hundred dollars assessed valuation on all taxable real and tangible personal property in the district. A copy of such order shall be published in two successive issues of any newspaper published in such district, if any, and if no newspaper is published in such district, three certified copies of such order shall be posted in public places in such district. The first publication in said newspaper and the posting of such notice shall be not less than ten days before the date of such election. Such court shall also select one or more judges and clerks for such election to receive the ballots and record the names of the voters." (Underlining ours)

The statute directs the county court to call an election for the purpose of voting for or against a tax levy for road propositions in any general or special road district in the event that ten or more qualified voters and taxpayers residing in any special road district shall petition the county court in which such district is located, requesting such an election. The county court is directed to call such an election within 20 days from the date of filing of such petition.

As long as the requirements of the statute are obeyed, there is no reason why such election may not be held on the same day and in connection with the general election in November, or for that matter, in connection with a regular primary, in the absence of any contrary public policy expressed or implied by the Constitution and statutes of Missouri. We find no such prohibition.

There are cogent reasons why such road district election may be held or is permissible on the same day as general elections. The convenience of the voters, availability of the election machinery, reduction in expense of the election, all argue for holding a road district election on the same day as the general election if the other provisions of the statute are complied with. Thus it is possible and indeed appropriate to so time the petition for such road district election as to enable the County Court to set the road district election on the day of a general or a primary election.

Moreover, our view of this matter is reinforced by the provisions of Section 111.255, RSMo 1959, which provides:

"Notwithstanding any other provisions of law, whenever any primary, general or special elections, or elections held by any school district, fire protection district, sewer district, municipalities, or other political subdivision of the state, are held upon the same day in any political subdivision, one polling place for the several elections in each precinct, consolidated precinct or district in the political subdivision shall whenever feasible be designated by the county clerk, board of election commissioners, or other proper election official, having authority over general elections in the political subdivision and the election officials in the polling places shall be designated by the county clerk, board of election commissioners or other proper election official and shall be compensated for one election only. Any person failing or refusing to comply with the provisions of this section is guilty of a misdemeanor."

This statute was enacted in 1957 and demonstrates a legislative policy and intent to authorize and permit various elections to be held on the same day, using the same election officials and facilities.

We do not overlook the case of *Dysart vs. City of St. Louis*, 11 S.W. 2d 1045, decided by the Supreme Court of Missouri en Banc in 1928 wherein an action was brought by a taxpayer to contest the validity of a city bond issue voted upon at an election held on the date of a regular primary election, upon the ground that the statutes regarding special elections had not been complied with. The court held that no special election was involved in the case; that the bond issue was a proposition presented in a general election, and that the vote on the bond issue did not constitute a special election.

The court defined a special election as one taking place at a time different from that at which an election fixed by law is held.

If the Dysart case is construed to mean that a statute using the term "special election" necessarily requires that such election must be held on a day other than the date of a regular general or primary election, we doubt that the court today would follow such interpretation. However, your questions involve Section 137.565, RSMo 1959. Although the caption of the statute as it appears in the revision reads "Special election for tax--petition--duty of county court--notice--", the body of the statute does not use the term "special election". The caption is merely supplied by a revisor for convenience and is not part of the statute. Thus, a road district election pursuant to Section 137.565, RSMo 1959, is not necessarily a "special election" (within the meaning of the Dysart case) and may be held on the date of a general election. We are of the opinion that an election may be held in the general road district referred to in your question number 1 pursuant to Section 137.565, RSMo 1959, and that such election may be held at the same time and in connection with a general election using the same judges and clerks as those serving at such general election. We believe the answers to both of your inquiries are in the affirmative.

CONCLUSION

It is, therefore, the opinion of this office that a proposition to levy an additional road tax in accordance with Section 137.565, RSMo 1959, may be held in a general or special road district on the same day and in connection with a general election.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Donald L. Randolph.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

August 6, 1964



Honorable Thomas D. Graham
State Representative, Cole County
201-204 Monroe Building
235 East High Street
Jefferson City, Missouri

Dear Mr. Graham:

This office is in receipt of your letter requesting a legal opinion upon the inquiry contained in the attached letter of Sheriff Debo of Cole County, Missouri. The inquiry referred to reads as follows:

"When no Governor's Warrant has been obtained, would it be held legal for a demanding state to take custody of a prisoner at the Missouri State Penitentiary providing that said prisoner had signed a Waiver before prison authorities, but had not done so before a Court of Record, nor had been produced before a Judge of a Court of Record and advised of all legal rights due him?"

We understand the question to ask whether or not an alleged fugitive from justice from another state, one who is in custody of Missouri State Penitentiary officials, may legally sign a written waiver of extradition proceedings before such officials, when no rendition warrant has been issued for such alleged fugitive by the Governor of Missouri, and the alleged fugitive has not been taken before a judge of a court of record for signing a written waiver of extradition proceedings and there advised of his legal rights in the matter.

Honorable Thomas D. Graham

In an opinion of this department written for Honorable W. H. Bates, Secretary-Attorney, Board of Police Commissioners, Kansas City 6, Missouri, on September 12, 1962, it was concluded that under provisions of Section 548.260 RSMo 1959, relating to written waivers of criminal extradition proceedings, such waivers must be signed and consented to in the presence of a court of record as provided in said section and does not authorize police officers to take such written waivers from the accused.

While the facts involved in that opinion and the present inquiry differ in minor details, the principles of law involved in each are the same, and it is believed said opinion fully answers your inquiry in the negative. A copy of such opinion is enclosed for your consideration.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

PNC:aa

Encl.

August 3, 1964



Honorable Warren E. Hearnnes
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Mr. Hearnnes:

This is in response to your recent request for an opinion of this office which reads in part as follows:

"We respectfully request an opinion of your office on whether or not preemptive rights can be abolished in a corporation formed under Chapter 351 by amending the Articles of Incorporation when said Articles of Incorporation make no reference to preemptive rights. If preemptive rights can be abolished, what percentage of the vote of the outstanding shares is necessary to pass the amendment abolishing same."

This specific question has never been decided by the appellate courts of this state, although I am advised that it is a principal issue in the case of Saigh v. Busch which is now pending before the Supreme Court of Missouri. It has long been the policy of this office that no opinion will be issued on a matter that is the current subject of litigation; and, in accordance with that policy, I must decline to express any opinion on the matter at this time.

Very truly yours,

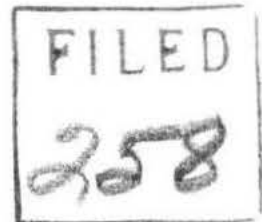
THOMAS F. EAGLETON
Attorney General

BANKS: State Chartered Banks have no authority to purchase stock in an Industrial Development Corporation.

September 9, 1964

Opinion No. 258

Honorable Gerald R. Massie
Acting Director
Division of Commerce and
Industrial Development
Jefferson Building
Jefferson City, Missouri



Dear Mr. Massie:

This opinion is in answer to a recent inquiry of Mr. Lawrence A. Schneider posing the following question:

"If a local bank wishes to purchase stock in the local Industrial Development Corporation, is this permissible under the statutes of Missouri and if so, to what extent may they invest in such a transaction?"

The general rule of law on this subject is found at 9 C.J.S., Banks and Banking, § 167, reading as follows:

"Although in some jurisdictions, under the statutes therein, banks are authorized to purchase, invest in, and sell stocks of corporations, as a general rule, banks are denied the power to purchase, acquire, or deal in the stock of other corporations, except where it is necessary for the bank to purchase such stock to enable it to procure services necessary or beneficial to it in carrying on its business, or where the power is given by express enactment."

In seeking express statutory directive in this matter, we search the provisions of Section 362.105, RSMo 1959, outlining the "rights and powers" of State chartered banks. This statute now contains eight separately numbered subparagraphs. Subparagraph (1) of the statute, except the proviso therein prohibiting branch banking is not materially different than Section 2745, RSMo 1889, which was mentioned in the following language from *City of Goodland v. Bank*, 74 Mo. App. 365, l.c. 371:

"Applying these rules of construction to section 2745, defining the rights and powers of the banking corporations authorized by other sections of said article 7, chapter 42, Revised Statutes, and it will be seen that neither this section nor the two sections previously herein referred to expressly or by implication authorized the defendant to subscribe for or purchase as an investment the said shares of stock in the defunct bank."

City of Goodland v. Bank, cited above, was ruled in 1898 and is cited approvingly in 1906 by the Supreme Court of Missouri in the case of *State ex rel. v. People's United States Bank*, 197 Mo. 574, l.c. 600, where the Court spoke as follows:

"It was ascertained by the Secretary of State that defendant bank had invested some of its funds in the stock of other corporations, and it was pointed out that this, by necessary implication, was in violation of section 1276, Revised Statutes 1899--the general rule of law being that 'a corporation has no power to subscribe for or purchase shares of stock in another corporation, unless such power is expressly granted, or unless the nature of the corporation and the circumstances

under which the stock is acquired are such as to render the transaction a necessary or reasonable means of carrying out the object for which it was created, or of accomplishing some purpose which is authorized by its charter.' [1 Clark & Marshall on Private Corporations, sec. 193, p. 523; City of Goodland v. Bank, 74 Mo. App. 365.]"

The case law announced in the cases of City of Goodland v. Bank, and State ex rel. v. People's United States Bank, both cited supra, has not been changed, but the legislative policy in Missouri in relation to this subject has been broadened from time to time as evidenced by subparagraphs (3), (4), (5) and (6) of our present statute, Section 362.105, RSMo 1959. Such amendments to the statute authorize a bank to purchase and hold capital stock necessary to qualify for membership in a federal reserve bank, to acquire stock in the Federal Deposit Insurance Corporation, a bank service corporation, and to acquire stock in any safe-deposit company organized and existing under the laws of the State of Missouri and doing business on premises owned or leased by the bank. In viewing such legislative action, it may be concluded that in those particulars covered by the amendments to Section 362.105, RSMo 1959, referred to above, the legislature has determined, as a matter of public policy, that power to invest in such authorized capital stocks will enable banks to procure services necessary or beneficial to carrying on the banking business. In addition, Section 362.173, RSMo 1959, specifically authorizes state chartered banks to invest in the capital stock of small business investment companies organized under the Small Business Investment Act of 1958. It must be concluded that since no legislative expression has been directed to a state chartered bank's authority to purchase stock in an Industrial Development Corporation, such authority does not exist in a state chartered bank.


Honorable Gerald R. Massie

CONCLUSION

It is the opinion of this office that state chartered banks in Missouri are without authority to purchase stock in an Industrial Development Corporation.

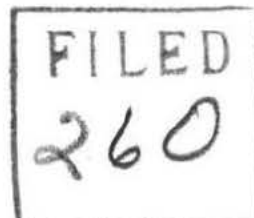
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas E. Eichhorst.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

INSURANCE: Articles of Incorporation of American Independence
Life Insurance Company.

July 14, 1964



Honorable Ralph H. Duggins
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

This opinion is in answer to your letter of July 6, 1964, by which you submitted to this office an executed copy of Declaration of Intention, including Articles of Incorporation, of original incorporators of the proposed American Independence Life Insurance Company. Also forwarded with your request for an opinion touching the documents referred to was proof of publication of the same as required by Section 376.070 RSMo 1959.

An examination has been made of the documents referred to in the preceding paragraph as required by Section 376.070 RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Sections 376.010 to 376.670 RSMo 1959, as amended, and not inconsistent with the constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO/dg

WELFARE, DIVISION OF:

Division of Welfare may use its State appropriated administration funds together with funds granted by the Federal Government to carry out a staff development program involving full-time educational leave to its selected employees.

OPINION NO. 263

August 13, 1964

Honorable Proctor N. Carter
Director, Division of Welfare
Department of Public Health and Welfare
State Office Building
Jefferson City, Missouri

Dear Mr. Carter:

This opinion is rendered in response to your inquiry reading as follows:

"The 1962 Public Welfare Amendments to the Federal Social Security Law emphasize provisions for services to help needy persons attain or retain capability for self-care and self-support and to maintain and strengthen family life for children. This approach recognizes the importance of rehabilitation in helping welfare recipients better to be able to care for themselves and, wherever possible, to become self-supporting. To be able to help people move from dependence toward self-reliance is largely dependent upon personnel capable of providing necessary services that can help to reduce the need for and the cost of the public assistance programs.

"To improve and up-grade staff skill and to increase the number of adequately trained and qualified public welfare personnel we plan a staff development program which will include in-service training and stipends to welfare staff on educational leave. In this connection we would appreciate receiving from you an opinion on the following question:

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"May the Division of Welfare use its State appropriated administration funds together with funds granted by the Federal Government to carry out a staff development program involving the granting of full-time educational leave with pay to its selected employees to insure adequately trained personnel in conformity with methods of administration found by the United States Government to be necessary for the proper and efficient administration of State plans under the Federal Social Security Act?"

Framers of Missouri's Constitution of 1945 treat specifically the subject of public health and welfare, and Sections 37 and 39, Article IV of such Constitution provide:

"Sec. 37. Department of Public Health and Welfare--duties and powers of General Assembly. --The health and general welfare of the people are matters of primary public concern; and to secure them the general assembly shall establish a department of public health and welfare, and may grant power with respect thereto to counties, cities or other political subdivisions of the state."

"Sec. 39. Cooperation with federal and other state governments. --In all matters of public welfare the general assembly may provide by law for cooperation with the United States, or other states."

The foregoing constitutional provisions have been implemented by the enactment of Section 191.010 RSMo 1959, reading as follows:

"There is hereby created and established as a department of state government 'A Department of Public Health and Welfare', which may hereafter be referred to as 'the department'. The scope and purpose of the department of public health and welfare shall be to improve and protect the health of the people of the state of

Honorable Proctor N. Carter

Missouri; to care for the mentally ill and those who are ill from other causes, so far as the laws of Missouri shall provide; to provide care and maintenance for certain other persons, as provided by law; to administer laws concerning social welfare, including certain social security laws. The department of public health and welfare shall be composed of three divisions, namely: The division of health, the division of mental diseases, the division of welfare."

Section 207.010 RSMo 1959 alludes to duties of the Division of Welfare in the following language:

"1. The division of welfare is an integral part of the department of public health and welfare and shall have and exercise all the powers and duties necessary to carry out fully and effectively the purposes assigned to it by law and shall be the state agency to

"(1). Administer state plans and laws involving pensions or assistance to persons over sixty-five years of age, who are incapacitated from earning a livelihood or are without means of adequate support;

"(2). Aid to dependent children;

"(3). Aid or relief in cases of public calamity;

"(4). Aid for direct relief;

"(5). Child welfare services;

"(6). Pensions and services for the blind; and

"(7). Any other duties relating to social security which may be imposed upon the department of public health and welfare."

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In addition to specific duties delegated to the Division of Welfare by the first paragraph of Section 207.010 RSMo 1959, quoted above, we find specific powers granted to the Division of Welfare by the following language from Section 207.020 RSMo 1959, as amended in 1961 (RSMo Cum. Supp. 1963):

"In addition to the powers, duties and functions vested in the division of welfare by other provisions of this chapter or by other laws of this state, the division of welfare shall have the power:

* * * * *

"(3). To administer, disburse, dispose of and account for funds, commodities, equipment, supplies or services, and any kind of property given, granted, loaned, advanced to or appropriated by the state of Missouri for any of the purposes herein.

* * * * *

"(5). To adopt, amend and repeal rules and regulations necessary or desirable to carry out the provisions of this chapter and which are not inconsistent with the constitution or laws of this state. * * *

"(6). To cooperate with the United States government in matters of mutual concern pertaining to any duties wherein the division of welfare is acting as a state agency, including the adoption of such methods of administration as are found by the United States government to be necessary for the efficient operation of state plans hereunder.

* * * * *

"(14). To establish or cooperate in research or demonstration projects relative to the welfare program, such as those relating to the prevention and reduction of dependency and economic distress, or which will aid in

Honorable Proctor N. Carter

effecting coordination of planning between private and public welfare agencies, or which will help improve the administration and effectiveness of programs carried on or assisted under the federal Social Security Act (42 U.S.C.A. § 301 et seq.) and the programs related thereto.

* * * * *

"(20). All powers and duties of the division of welfare shall so far as applicable apply to the administration of any other law or state law wherein duties are imposed upon the division of welfare acting as a state agency."

No where have we found the power to cooperate with the Federal government granted by statute with such certainty and purposeful scope as is expressed in the language quoted above from Section 207.020 RSMo 1959, supra, as amended in 1961.

At the expense of brevity we here re-emphasize the important powers given to the Division of Welfare as a further breakdown of quoted language from Section 207.020 RSMo 1959, supra, is accomplished. In subparagraph (3) of the statute we find power vested in the Division of Welfare to "administer, disburse, dispose of and account for funds * * * appropriated by the state of Missouri for any of the purposes herein". In subparagraph (6) of the statute we find power vested in the Division of Welfare to cooperate with the United States government, such power extending to "the adoption of such methods of administration as are found by the United States government to be necessary for the efficient operation of state plans hereunder".

We discover only one limitation, expressed in Section 207.020 RSMo 1959, affecting the specific powers granted, and it is found in subparagraph (5) of the statute, it pertains to the adoption, amendment and repeal of rules and regulations, and contains a prohibition against the same being "inconsistent with the constitution or laws of this state".

The United States, through the Secretary of Health, Education, and Welfare, has found that its prescribed methods of administration, including a staff development plan involving the granting of full-time educational leave with pay by states to their selected employees, is necessary for the proper and efficient administration of state plans under the Federal Social Security Act.

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Evidence of such "finding" is found in the following language in the Office Memorandum of December 6, 1961, from Abraham Ribicoff, Secretary of Health, Education, and Welfare, directed to Mr. W. L. Mitchell, Commissioner of Social Security, on the subject of "Administrative Actions Necessary to Improve our Welfare Programs":

" * * * I would like you to proceed immediately to implement the following decisions:

* * * * *

"7. Improvement of State Staff Training and Development Programs. The central core of proper and efficient administration is personnel--adequate in number and appropriately trained to do the job required. With the changing characteristics of the public assistance caseload, and the need to emphasize more and more the preventive and rehabilitative aspects of public welfare, the existence in each State of an adequate staff development program is imperative. * * * Federal financial participation is now available for the administration of staff development programs, including in-service training and educational leave, as a part of the costs of administering public assistance. * * * Each state should have a State-wide staff development plan which would include both in-service training and opportunities for professional and technical education. * * * "

In implementing the directive of December 6, 1961, issued by the Secretary of Health, Education, and Welfare, the Commissioner of Welfare, at Part III of the Handbook of Public Assistance Administration, issued by the Bureau of Family Services, within the Welfare Administration, on October 16, 1963, has set forth requirements, as established under the authority of Titles I, IV, X, XIV, and XVI of the Social Security Act, requiring states to provide such methods of administration as the Commissioner of Welfare finds necessary for the proper and efficient operation of State plans. Part III, Section 3210 of the Handbook of Public Assistance Administration, referred to above, provides, in part:

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" * * * For these reasons and upon direction of the Secretary, requirements for strengthening agency staff development programs are being established under the authority of titles I, IV, X, XIV, and XVI of the Social Security Act to require States to provide such methods of administration as the Secretary finds are necessary for the proper and efficient operation of State plans. Federal funds are available for the administration of staff development programs, including in-service training and educational leave, as a part of the costs of administering titles I, IV, X, XIV and XVI. The law provides for matching of training expenditures at 75 percent under specified timing and conditions. (See Handbook IV-4000)."

Part III, Section 3300 of the Handbook of Public Assistance Administration, dealing with requirements for a State plan of staff development, provides, in part, as follows:

"A State plan must include:

* * * * *

"C. 3, b. Provision for educational leave for employees, including

"(1). Provision for educational leave with pay for selected employees to fill positions designated by the agency as requiring professional and technical education. * * *"

The constitutional and statutory provisions discussed above clearly demonstrate on their face that their basic objective is a public purpose, as distinguished from aid to any private person.

The staff development plan heretofore referred to will involve disbursement of State appropriated funds as selected employees of the Division of Welfare are granted full-time educational leave with pay under the plan. In an opinion of this office dated April 19, 1946, three provisions of Missouri's 1945 constitution were cited as legal impediments to the State Social Security Commission's authority to grant a leave of absence to any employee with pay for the purpose of attending

Honorable Proctor W. Carter

some educational institution to better qualify the employee for some key supervisory position with the State Social Security Commission. We are not constrained to follow such opinion for three principal reasons: First, no effort was made in such opinion to discuss the language of the statutes giving specific powers to the State Social Security Commission as they might bear relation to the problem presented. Second, in citing Missouri's constitution of 1945, Article III, Sections 38(a) and 39(1) and (2), as impediments to the plan, such constitutional provisions were not demonstrated to be violated by the statutes prescribing powers and duties of the state agency involved. Third, the 1961 amendment to Section 207.020 RSMo 1959 gave additional powers to the Division of Welfare which were not spelled out in the statute as it existed in 1946, and are now found at subparagraphs (9) to (19), inclusive, of such statute.

Article III, Section 38(a), Missouri's constitution of 1945 provides:

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, and general laws providing for pensions for the blind, for old age assistance, for aid to dependent or crippled children or the blind, for direct relief, for adjusted compensation, bonus or rehabilitation for discharged members of the armed services of the United States who were bona fide residents of this state during this service, and for the rehabilitation of other persons. Money or property may also be received from the United States and be redistributed together with public money of this state for any public purpose designated by the United States."
(Underscoring supplied)

Article III, Section 39(1) and (2), Missouri's constitution of 1945 provides:

Honorable Proctor N. Carter

"The general assembly shall not have power:

"(1). To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation.

"(2). To pledge the credit of the state for the payment of the liabilities, present or prospective, of any individual, association, municipal or other corporation."

The underscored language found in Article III, Section 38(a), Missouri's constitution of 1945, quoted above, represents new matter of substance not found in Missouri's constitution of 1875. In such language we find an expression of Missouri's forward approach to the distribution of public monies for purposes, and under conditions, there stated. While we are inclined to rest the ultimate conclusion of this opinion on the language appearing in the last sentence of Article III, Section 38(a) of Missouri's 1945 constitution, quoted supra, we will take an additional step to demonstrate that the expenditure of state appropriated funds by the Division of Welfare to foster a staff development plan involving full-time educational leave with pay to its selected employees does not involve the giving of state aid to a private person in contravention of the constitutional provisions set out above.

Appropriations made by the legislature to the Division of Welfare covering the biennium from July 1, 1963, to June 30, 1965, disclose that a specific appropriation has been made for "administration" purposes. It must be conceded that such "administration" purposes are public purposes in light of the organization and functions of the Division of Welfare as outlined in the forepart of this opinion. A staff development program in the Division of Welfare goes to the very heart of "administration" of the Division's various programs, and must be considered germane to the public purposes for which the Division was created.

In State ex inf. Dalton v. Land Clearance For Redevelopment Authority, 364 Mo. 974, 270 SW2d 44, decided by the Supreme Court of Missouri in 1954, it was there contended that the Authority's proposal to sell real estate within a blighted area to private developers at a price less than the cost of acquisition constituted the giving of special privileges, the lending of public credit and the granting of public property, in aid of

Honorable Proctor N. Carter

a private person, association or corporation in violation of Article III, §§ 38(a) and 39, of Missouri's constitution of 1945. In holding that the constitutional provisions just cited were not violated by carrying out the provisions of the Land Clearance For Redevelopment law, the Supreme Court used language enunciating a principle which we feel must be applied to the facts at hand. We here quote from such opinion at 364 Mo. 974, l.c. 989, 990:

"The great weight of authority is that there is no private grant when land is cleared for the purposes herein contemplated and is thereafter sold at a loss, but for its then fair value. *Rowe v. Housing Authority of Little Rock*, 220 Ark. 698, 249 SW2d 551, 553; *Redevelopment Agency of San Francisco v. Hayes*, Cal. App., 266 P.2d 105, 125; *Ajootian v. Providence Redevelopment Agency*, R.I. Sup., 91 A. 2d 21, 26; *Gohld Realty Co. v. City of Hartford*, Conn., 104 A. 2d 365, 372; *Foeller v. Housing Authority of Portland*, 198 Ore. 205, 256 P. 2d 752, 767. In all of these cases it is pointed out that the primary purpose of a redevelopment project is a public purpose, and that any benefits to private individuals are merely incidental to the public purpose. To the same effect is *Laret Investment Co. v. Dickmann*, 345 Mo. 449, 134 SW2d 65. See also: *Jasper County Farm Bureau v. Jasper County*, 315 Mo. 560, 286 SW 381; *State ex rel. Kansas City Insurance Agents' Association v. City of Kansas City*, 319 Mo. 386, 4 SW2d 427."

The Missouri decisions cited in the language quoted above from *State ex inf. Dalton v. Land Clearance For Redevelopment Authority* were ruled in light of those provisions of Missouri's constitution of 1875 prohibiting appropriations by the legislature for purposes not public in nature, and not differing materially from our present constitutional provisions referred to herein on the subject.

Honorable Proctor N. Carter

Those employees of the Division of Welfare who are to be selected for participation in the staff development program and thereby receive full-time educational leave with pay, as a condition of their employment, cannot be considered as other than indirect beneficiaries of an appropriation made by the legislature for purposes of "administration" of the Division of Welfare in carrying out the public purpose of the law being administered.

Conclusion

It is the opinion of this office that the Division of Welfare may use its State appropriated administration funds together with funds granted by the Federal government to carry out a staff development program involving the granting of full-time educational leave with pay to its selected employees to insure adequately trained personnel in conformity with methods of administration found by the United States government to be necessary for the proper and efficient administration of state plans under the Federal Social Security Act.

The foregoing opinion which I hereby approve was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO/dg

LOTTERIES:
NEWSPAPER PROMOTION:

A newspaper subscription contest in which contestant is awarded points for subscriptions sold does not constitute a lottery in violation of Section 563.430 because the element of chance is absent.

December 31, 1964



Honorable Brunson Hollingsworth
Prosecuting Attorney
Jefferson County
Hillsboro, Missouri

OPINION NO. 265

Dear Mr. Hollingsworth:

This is in answer to your request for an official opinion of this office, which reads in part as follows:

"The Jefferson County Press-Times newspaper of June 25, 1964, contains a contest. Reference is made to your Opinion of June 29, 1951, to the portions of the Jefferson Republic of June 14, 1951, which I trust remain in your files.

"In both schemes there seems to be a use of discounts, commissions, incentives and bonuses. Periodical publication of commission agents status is made in terms of 'votes' which are given collateral to a commission of 20%. The allocation of 'votes' is according to published rules and the 'votes' can be gained by

- (1) Merely reporting periodically.
- (2) Acting promptly.
- (3) Selling longer subscriptions.
- (4) Emphasizing new subscriptions.
- (5) Selling subscriptions at all.
- (6) Sending in a coupon.

"This subscription campaign is promoted in the excitatory language of gaining.

"It seems clear that consideration and prize are proveable in this promotion. Your Opinion is requested as to whether the element of chance is present."

December 31, 1964

It is well settled in this state that the elements of a lottery are prize, chance and consideration. State ex Inf. McKittrick v. Globe-Democrat Pub. Co., 110 S.W. 2d 705, 1.c. 713. If any of these elements are lacking in the proposed contest, it is not illegal.

As noted in your opinion request, it cannot be questioned that the element "prize" is present in the plan, here presented for consideration. Indeed, the sole inducement for entering the proposed contest is the opportunity of winning a substantial award if successful.

Nor can it be questioned that the element of "consideration" is present, as defined in the 1963 amendment to our lottery statute as follows:

" . . . provided, however, that this section shall apply only where there is consideration in the form of money, or its equivalent, paid to or received by the person awarding the prize."

Certainly, the money received by the publisher for subscription and for the copy of newspapers containing coupons falls well within the above quoted statutory definition of consideration of an element of lottery.

However, the question remains whether the element of "chance" exists in this proposed plan.

This contest may be readily distinguished from the 1951 opinion mentioned in your opinion request. In that plan the purchaser of the subscription could cast his vote for any person who had entered the contest. Under that plan the "chance" element might be a dominant factor in that the outcome would not be determined by the efforts of the individual contestant but might well be determined by factors outside his control. This is not true in the contest here under consideration. Other distinguishing factors will be noted in the course of this opinion.

The leading case on the element of "chance" in the State of Missouri is the case of State v. Globe-Democrat, supra, decided in 1937. In that case the Missouri Supreme Court noted a contest may be a lottery even though skill, judgment, or research enters therein to some degree if chance in a larger degree determines the result. The Court also observed that it is a question whether the chance factor is dominant or subordinate in State ex Inf. McKittrick v. Globe-Democrat Pub. Co., 1.c. 717:

" . . . in other words the rule that 'chance' must be the dominant factor is to be taken in a qualitative or causative sense rather than in a quantitative sense. This was directly decided in Coles v. Odhams Press, Ltd., supra, when it was

December 31, 1964

held the question was not to be determined on the basis of the mere proportions of skill and chance entering in the contest as a whole."

Other jurisdictions have defined "chance" as an element of lotteries as follows:

"The 'chance' which is an essential element of lottery, is the antithesis of that which happens by plan or design or by the exercise of volition or judgment." Com. v. Laniewski, 98 A.2d 215, 217.

"As an essential element of lottery, the word 'chance' refers to attempt to attain certain ends, not by skill or known or fixed rules, but by happening of a subsequent event, incapable of ascertainment or accomplishment by means of human foresight or ingenuity." U.S. v. Rich, D.C. Ill, 90 F. Supp. 624, 627.

"'Chance' as element of lottery, is something that befalls as result of unknown or unconsidered forces, a happening in a particular way, issue of uncertain conditions, a fortuity, an unforeseen or inexplicable cause or its operation, or an accident." Minges v. City of Birmingham, 36 So. 2d 93, 96, 97, 251 Ala. 65."

Keeping the above definitions in mind, can it be said that the "chance" element is the dominant factor in the proposed plan? We think not. The language contained in the case of DeWitt Motor Co. vs. Bodnark (Ohio) 169 N.E. 2d 660, 667 [6] is appropriate to the facts of this contest.

The court stated:

"In all lines of legitimate business, the members thereof are working to bring about a certain result for gain or profit and while these contingencies may never develop, nevertheless the dominating factor of judgment, design and volition has entered into their work. This contingency is not, as used in the definition of a lottery, termed 'chance'."

Basically, the plan here under consideration awards a prize to the contestant who sells the most subscriptions. All contestants are paid a commission on each sale.

We find a problem however that presents difficulty. On page 2 of the promoter's letter of explanation concerning the contest, we find the following language:

December 31, 1964

"The person making the sale is automatically credited with the number of points appropriate to that sale; the buyer of the subscription has no choice whatever concerning the distribution of these points."

However, in the advertisement in the newspaper on page 1 thereof, we find the following language:

"Subscriptions may also be left at the campaign office * * * or at the press times office * * * credit and votes will be given to the candidate of your choice."

These two statements appear to be inconsistent. If the former statement is correct then there would be no element of chance. If, however, the latter statement is the rule then the element of chance is definitely injected into the contest.

Another problem is presented in connection with the advertisement in the newspaper whereby a contestant received points or votes for mailing in a coupon clipped from the advertisement. This is an introductory proposal to the contest and is published one time. The points or votes earned by sending in this coupon are credited only to the contestant. This does not seem to inject the element of chance.

However, another and different coupon is provided in the advertisement which permits anyone to clip the coupon and credit 500 votes to any contestant the sender desires. This appears to inject the element of chance. Another rule of the contest is that the points to be awarded to the contestant for obtaining new subscriptions decreases as the contest progresses. This would have the effect of discouraging a contestant from himself purchasing subscriptions in order to win. This factor appeared to be decisive in the 1951 opinion of this office mentioned above. The promoter's letter also stated that contestants are prohibited from purchasing blocks of subscriptions for themselves.

It is our view that this plan (with the exceptions above noted) is essentially a subscription contest in which the person who sells the greatest number of subscriptions according to the rules of the contest wins the prize, but all persons selling subscriptions are entitled to a commission on each one sold. In this sense this contest cannot be distinguished from any number of sales contests conducted by various companies to stimulate the sale of their products. The ability to persuade a purchaser to buy any product is based on human ingenuity and foresight and is not inexplicable and incapable of ascertainment.

Having reached the conclusion that the element of "chance" is absent from this proposed contest we are of the opinion that it is therefore not a lottery as contemplated by Section 563.430, RSMo. Cum. Supp. 1963.

December 31, 1964

CONCLUSION

A newspaper subscription contest in which a contestant is awarded points for each subscription sold within the contest period does not constitute a lottery in violation of Section 563.430 because the element of chance is absent.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Robert D. Kingsland.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

JGS/cs

INSURANCE: Articles of Incorporation of All American Life
Insurance Company.

July 13, 1964



Honorable Ralph H. Duggins
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

This opinion is in answer to your letter of this date by which you submitted for examination and certification under Section 376.070 RSMo 1959, an amended Declaration of Intention of original incorporators of the proposed Country-Wide Life Insurance Company, whereby the name of such proposed company is changed to All American Life Insurance Company, such amendment being made in conformity with suggestions made by this office in its letter of July 10, 1964, addressed to you.

A review has been made of the amended Declaration of Intention referred to in the preceding paragraph as required by Section 376.070 RSMo 1959, and it is the opinion of this office that such Amended Declaration of Intention, and Articles of Incorporation of the proposed All American Life Insurance Company are in accordance with the provisions of Sections 376.010 to 376.670 RSMo 1959, as amended, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion which I hereby approve, was prepared by my assistant, Julian L. O'Malley.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JLO/dg

August 5, 1964



Honorable Harry E. Hatcher
State Senator, 28th District
P. O. Box No. 128
Neosho, Missouri

Dear Senator Hatcher:

This is in reply to your recent letter requesting an opinion of this office regarding whether special road districts organized under Sections 233.010 to 233.165 may place and accept competitive bids for construction contracts on road construction which is not a part of their district or in any way financed or subsidized by the special road district.

Enclosed are two former opinions of this office. The opinion dated February 16, 1954, to the Honorable Garner L. Moody, Prosecuting Attorney of Wright County held that a township in a county under township organization was not empowered to use township machinery to do work for private individuals for hire. The opinion dated December 17, 1962, to the Honorable Rufe Scott, Prosecuting Attorney, Stone County, held that a special road district organized under Sections 233.010 to 233.165, RSMo 1959, may not hire out special district machinery to do work in other districts for hire with the exception set out in Section 233.105. We believe the reasoning and the conclusions given in these two opinions apply to the questions which you have asked.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

GT:df

Enclosures

Opinion #269 Answered by Letter.
Eagleton

July 15, 1964



Representative Thomas A. Walsh
Capitol Building
Jefferson City, Missouri

Dear Representative Walsh:

We have your opinion request in which you ask two questions in connection with Missouri's Prevailing Wage Law.

Question #1. What is the penalty provision against a public body or an employer who violates the Prevailing Wage Law, Sections 290.210 to 290.310, RSMo 1959?

Section 290.310, RSMo 1959 provides:

"Any officer, agent or representative of any public body who willfully violates, or omits to comply with any of the provisions of sections 290.210 to 290.310, and any contractor or subcontractor, or agent or representative thereof, doing public work who neglects to keep an accurate record of the name, occupation and actual wages paid to each workman employed by him, in connection with the public work or who refuses to allow access to same at any reasonable hour to any person authorized to inspect same under sections 290.210 to 290.310, shall be punished by a fine not exceeding five hundred dollars, or by imprisonment not exceeding six months, or by both such fine and imprisonment."

Representative Thomas A. Walsh - 2.

July 15, 1964

Thus, under this section it would be up to the local prosecuting attorney of the county in question to determine whether to file a misdemeanor charge against anyone who violates the Prevailing Wage Law.

Question #2. How does an employee who has been paid wages less than the proper prevailing wage recover back wages?

Section 290.300, RSMo 1959 provides:

"Any workman employed by the contractor or by any subcontractor under the contractor who shall be paid for his services in a sum less than the stipulated rates for work done under the contract, shall have a right of action for whatever difference there may be between the amount so paid and the rates provided by the contract and an action brought to recover same shall be deemed to be a suit for wages, and any and all judgments entered therein shall have the same force and effect as other judgments for wages."

Thus, under this section any aggrieved employee can file a civil action on his own behalf for back wages against his employer.

Yours very truly,

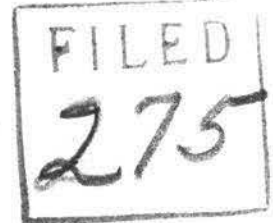
THOMAS F. EAGLETON
Attorney General

ELECTIONS:
VOTING:
ABSENTEE VOTERS:
VOTER REGISTRATION:

In counties governed by Chapter 114, local option registration law, county clerk should furnish registration forms to persons who cannot register in person because of illness, disability or absence from county only upon written application of such person, stating the facts relative to illness, disability or absence.

OPINION NO. 275

August 25, 1964



Honorable Merrill E. Montgomery
Prosecuting Attorney
Sullivan County
Milan, Missouri

Dear Mr. Montgomery:

In your letter of July 21, 1964, you state that Sullivan County has adopted voter registration by local option. The local option voter registration law is found in Chapter 114, RSMo, and encompasses Sections 114.010 to 114.250, RSMo 1959, inclusive, as amended.

Your question concerns the registration of absentee persons. The statute to which you refer, Section 114.060, RSMo, is as follows:

"114.060. Absentee or disability registration, procedure.--Any person, who through illness, expects to be prevented from appearing at the place of registry or at the county clerk's office within the time for registration prior to a primary or general election shall on application, stating the facts as to his illness, disability, or absence from the county be provided with a form by the county clerk, to be filled in by the applicant, showing all data necessary for the registration records. The completed form shall be sworn to by the applicant before an officer authorized to administer oaths and shall be returned by mail or otherwise to the county clerk at least thirty days before any primary

Honorable Merrill E. Montgomery

or general election. Upon filing the completed form as herein required, if in proper form, the applicant shall be deemed duly registered."

This statute provides that "any person, * * * shall on application, * * * be provided with a form by the county clerk * * * showing all data necessary for the registration records. * * *" The purpose of this section is to permit a person who desires to register but who is ill, disabled, or absent from the county and thereby is prevented from registering at the county clerk's office to do so within the time for registration prior to a Primary or General Election. The statute provides that the applicant shall state the facts respecting his illness, disability or absence from the county.

This written application could be on forms provided by the county clerk, if he desires to provide them or the application could be in any other written form that contains the information required by the statute.

This statute requires that registration forms will be furnished to the applicant only upon written application, and he must set out the reasons why he cannot appear in person.

The courts of this state have held generally that, "Election laws must be liberally construed in aid of the right of suffrage." Nance v. Kearbey, 158 S.W. 629, 1.c. 631. This statement was quoted with approval by the Supreme Court en Banc in the case of Application of Lawrence, 185 S.W. 2d 818, 1.c. 820, and again in State v. Coleman, 349 S.W. 2d 945, 1.c. 947. The case of State ex rel. Hay v. Flynn, 147 S.W. 2d 210, 1.c. 211, states:

"* * * The primary purpose of registration laws is to prevent fraudulent abuse of the franchise, by providing in advance of elections an authentic list of the qualified voters. * * *"

In the case of State v. Brown, 33 S.W. 2d 104, the Supreme Court en Banc, in passing on a statute concerning an absentee registration, said at 1.c. 107:

Honorable Merrill E. Montgomery

"* * * Now every person having the qualifications prescribed by the Constitution has the right to vote, and the sole objective of the statute is to determine the individuals who possess those qualifications and make a public record thereof. * * *"

A registration blank cannot be sent out where the request is made by telephone, nor can registration blanks be given out to party workers or others.

The person desiring to register must personally make a written request for the blanks from the county clerk.

We see no objection to a deputy clerk taking the registration forms to the applicant, in person, providing the proper application is made in writing containing the information and requirements as set forth herein.

CONCLUSION

It is the opinion of this office that the county clerk should furnish registration forms, upon written application therefor to the county clerk, to any person who because of illness, disability or expected absence from the county, is unable to appear personally at the clerk's office to register.

The written application should state the facts relative to the illness, disability or absence.

Application for registration blanks cannot be made by telephone. Registration blanks cannot be given out to party workers or others.

The request for the registration blanks must come from the person desiring to register and must be in writing.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

RESTAURANTS: Fried chicken sold for consumption off
MEALS: premises and not part of complete meal
READY-TO-EAT MEALS: must be sold by weight.
MEAT:
POULTRY:

August 12, 1964

Opinion No. 276



Mr. Don Thomason, Commissioner
Department of Agriculture
Jefferson Building
Jefferson City, Missouri

Dear Mr. Thomason:

This is in answer to your letter of July 22, 1964,
requesting an opinion of this office which reads as follows:

"The Missouri Restaurant Association has asked this office for an opinion from the Attorney General's Office on Section 413.275, Missouri Weights and Measures Law, in order to determine whether the product sold by various business establishments, namely, chicken sold by the piece and removed from the premises, supposedly for a ready to eat meal, is in violation of Section 413.275, Missouri Weights and Measures Law."

Section 413.275, RSMo 1959, as far as here pertinent provides:

"Except for immediate consumption on the premises where sold, or as one of several elements comprising a ready-to-eat meal sold, as a unit, for consumption elsewhere than on the premises where sold, all meat, meat products, poultry, and all sea food except shellfish, offered or exposed for sale or sold as food, shall be offered or exposed for sale and sold by weight."

It is my understanding that this request was prompted by certain advertisements which advertise the sale of fried chicken at a specific price per number of pieces rather than by weight as required by Section 413.275.


To come within the statutory exception, the chicken would have to be sold for immediate consumption on the premises or, "as one of several elements comprising a ready-to-eat meal sold, as a unit, for consumption elsewhere than on the premises where sold, * * *". The words "several elements" and "as a unit" indicate that a ready-to-eat meal must consist of more than one item of food. Certainly fried chicken is usually not considered a meal in itself. It is therefore our opinion that fried chicken alone is not a ready-to-eat meal and does not come within the second exception in Section 413.275.

CONCLUSION

The sale or advertisement for the sale of a certain number of pieces of fried chicken for a specified price is in violation of Section 413.275, unless the chicken is sold for immediate consumption on the premises where sold.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

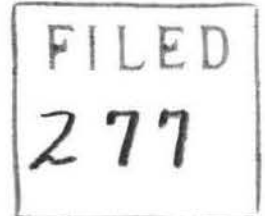
Very truly yours,


THOMAS F. EAGLETON
Attorney General

LINCOLN UNIVERSITY: (1) Board of Curators of Lincoln University
BOARD OF CURATORS: may confer honorary degrees and titles by a
majority vote of the quorum. (2) Board of
Curators may take valid action relating to the
payment of bills and other such matters if a majority of a quorum
affirmatively vote for such action. (3) The Board of Curators may
delegate to an executive board authority to ascertain facts and to
make recommendations to the full board.

Opinion No. 277

October 1, 1964



H. Byron Masterson, President
Board of Curators
Lincoln University
Jefferson City, Missouri

Dear Mr. Masterson:

This is in answer to your letter of July 23, 1964, requesting an official opinion of this office in which you ask the following three questions concerning the Board of Curators of Lincoln University:

"1. In cases where a quorum is present, can a majority vote of those present confer honorary titles and/or honorary degrees, such as the title 'President Emeritus' at a meeting eight years after the worker has severed his connections with the University, when the action is not unanimous, and therefore represents less than a majority of the full Board? (By statute, five of the nine members constitute a quorum.)

"2. In similar circumstances, can a majority of a quorum take valid action relating to the payment of bills and other such matters relating to the operation of the University?

"a. What authority can the full Board delegate to the Executive Committee (composed of three members) in matters relating to payment of bills, entering into contracts, and other such matters relating to the operation of the University?" In a subsequent conversation you informed this office that the executive committee only ascertained facts and made recommendations to the full board.

Section 175.040, RSMo, makes Chapter 172 dealing with the University of Missouri Board of Curators applicable to the Board of Curators of Lincoln University:

"It is hereby provided that the board of curators of the Lincoln University shall organize after the manner of the board of curators of the state University of Missouri; * * *"

Section 172.140, 172.280 and 172.300, RSMo, are relevant to the first question concerning the number of votes necessary to confer honorary titles and degrees.

"At all meetings of the board of curators five members shall be necessary to constitute a quorum for the transaction of business." Section 172.140.

"The curators shall have the authority to confer, by diploma, under their common seal, on any person whom they may judge worthy thereof, such degrees as are known to and usually granted by any college or university." Section 172.280.

"The curators may appoint and remove, at discretion, the president, deans, professors, instructors and other employees of the university; * * *" Section 172.300.

Section 172.140, supra, clearly allows the Board to transact business with five members (quorum) present. The conferring of honorary titles or degrees would be a business transaction for the Board of Curators. A quorum is the necessary legal number of members present to transact business (Black, Law Dictionary, 4th Ed., 1951). A majority vote of those members present, provided a quorum is also present, is sufficient to approve a proposal, 19 C.J.S., Corporations, §749. It therefore is not necessary to have five affirmative votes to pass a proposal unless all nine members of the board are present.

Section 172.280, supra, clearly authorizes the Board to confer degrees "on any person whom they [the Board of Curators] may judge worthy thereof". There is no statutory requirement that the Board of Curators be unanimous in their choice of persons eligible for honorary degrees or that the recipient of the degree have any special qualifications. The Board has complete

discretion in who is to receive honorary degrees provided the necessary affirmative vote is given by the Board of Curators.

Likewise, Section 172.300, supra, allows the Board discretion in appointing a president and defining the powers and duties of the office. Since this statute gives the Board discretion in appointing the president, the creation of the office of "President Emeritus" is a valid exercise of the Board's discretion. The Board also has the power to "define and assign" the duties of this office. The appointment of a "President Emeritus" is an ordinary business transaction which requires only a majority affirmative vote provided a quorum is present.

In answer to your second question, relating to the necessary number of votes for valid action on payments of bills and other matters concerning the operation of Lincoln University, Section 172.140, RSMo, is involved:

"At all meetings of the board of curators five members shall be necessary to constitute a quorum for the transaction of business."

Section 172.140 clearly provides that five members of the Board shall constitute a quorum. A majority of this quorum may validly transact business, 19 C.J.S., Corporations, §749. The statute does not require that there always be five affirmative votes. Five affirmative votes would be necessary only when all nine members were present. The payment of bills is clearly an ordinary business transaction which may be affirmed or disaffirmed by a majority of the Board provided that a quorum is present.

In answer to your third question relating to the full board's power to delegate authority to the executive committee you will recall our recent telephone conversation in which you stated that the executive committee after ascertaining relevant facts would vote on a proposal to decide what recommendation would be made to the full board. Subsequently, the recommendation of the executive committee would be voted on by the full board for approval or disapproval. Section 172.230 provides:

"The board of curators shall appoint annually three of their number to act as an executive board, who shall meet each month for the purpose of auditing claims and attending to such other business as may

H. Bryon Masterson, President

be entrusted to them by the board of
curators not inconsistent with this
chapter. * * *" (Emphasis added.)


It is the opinion of this office that the full board
may delegate to an executive board the authority to ascertain
relevant facts and to make recommendations to the full board.
We can find nothing in Chapter 172 which is inconsistent with
such a delegation of authority.

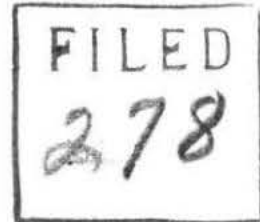
CONCLUSION

Therefore, it is the opinion of this office that: (1)
The Board of Curators of Lincoln University may confer honorary
degrees and titles by a majority vote of a quorum; (2) The
Board of Curators may take valid action relating to the payment
of bills and other such matters if a majority of a quorum
affirmatively votes for such action; and (3) The Board of
Curators may delegate to an executive board authority to
ascertain facts and to make recommendations to the full board.

The foregoing opinion, which I hereby approve, was prepared
by my Assistant, Jim DeNeen.

Very truly yours,


THOMAS F. EAGLETON
Attorney General



August 17, 1964

Honorable Vernon C. Mayfield
Regional Counsel
Housing and Home Finance Agency
Office of the Regional Administrator
300 West Vickery Boulevard
Fort Worth, Texas 76104

Dear Mr. Mayfield:

This letter is in answer to your letter of July 23, 1964, requesting an opinion of this office regarding the authority of the Missouri Division of Health to plan, finance, and construct the project described in their application for Public Works Planning dated June 9, 1964, in connection with the Missouri State Sanatorium at Mount Vernon, Missouri. You also ask our opinion on the authority of this applicant to enter into a contract with the Housing and Home Finance Agency for funds to be repaid upon construction of the project.

Section 192.025, RSMo, provides:

"The division of health of the state department of public health and welfare is hereby designated the official agency of the state of Missouri to receive federal funds for health purposes. The division shall comply with the acts of congress and with any rules and conditions made by any federal agency in regard to the use and distribution of such funds. Such funds shall be deposited in the state treasury and kept in such separately designated funds as may be required to carry out the purposes for which the federal

Honorable Vernon C. Mayfield

grants are made. Disbursements of such funds from the treasury shall be made on warrants duly issued on requisitions of the division. The general assembly shall appropriate such funds to the use of the division for such purposes."

Section 192.250, RSMo, provides:

"The division of health of the department of public health and welfare is hereby designated the official state agency to receive any and all federal and other grants and aids for making a survey and for the construction of hospitals and health centers It shall be empowered to receive any and all such grants and aids under the terms of such grants and aids and to pay them out under any and all provisions as may be attached to such grants and aids. It shall be authorized to render such reports as may be required under any and all grants and aids; provide such minimum standards for maintenance and operation of hospitals and health centers as may be required under the terms of such grants and aids; and to require compliance with such standards in the case of hospitals and health centers which shall have received such grants and aids."

It is clear from the quoted sections of the Missouri statutes that the Division of Health has the authority to plan, finance and construct the project described in their application for Public Works Planning in connection with the Missouri State Sanatorium, an institution under the jurisdiction of the Division of Health, pursuant to Section 192.010 RSMo., which states, in part, "The division of health shall also have control and administration over the Missouri State Sanatorium at Mt. Vernon as provided by law."

Inasmuch as Public Law 560, 83rd Congress, as amended by Public Law 345, 84th Congress, governing this application,

Honorable Vernon C. Mayfield

provides that the advance requested in the application must be repaid to the Housing and Home Finance Agency only in the event that the project is constructed, it is our view that the Division of Health has the authority to enter into a contract providing that the funds should be repaid upon construction of the project.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

DLR:aa

LIBRARY BOARDS:
LIBRARY DISTRICTS:
CITY DISTRICTS:
COUNTY DISTRICTS:
CITY-COUNTY LIBRARIES:
CONSTITUTIONAL LAW:

A City-County library board is authorized to construct a library building and employ architects provided Article VI, Section 26(a), of the Missouri Constitution is not violated, which prohibits incurring indebtedness in any year/exceeding the income and revenue for that year plus unencumbered balances from previous years.

November 20, 1964

OPINION NO. 279



Honorable Thomas D. Graham
State Representative
Cole County
201-204 Monroe Building
235 East High Street
Jefferson City, Missouri

Dear Mr. Graham:

This opinion is in response to your opinion request which reads as follows:

"The voters of Jefferson City recently increased their library tax from 1 to two mills, pursuant to Chapter 182, RSMo. As I understand, the proposal provides this additional one mill is to be used for the erection of a new library facility here in Jefferson City and this additional tax is for a period of ten years.

"I have been contacted by the Jefferson City Library Board who wonder whether or not they can obligate this money before it is received. They, of course, will not receive any money at all from this additional tax until April of 1965 but, if they are to go forward with the hiring of a library consultant and the purchasing of land and planning by an architect of the proposed building, they must do so now. I, therefore, request an opinion from your office whether or not they may obligate these funds before they receive them."

We have further been informed that the Jefferson City-Cole County library has recently been established as a city-county library as authorized under Section 182.291, RSMo 1959. The substance of your inquiry therefor is, can the board in anticipation of the receipt of tax revenues, but before they are actually received, (1) purchase land for a library site, (2) employ a library consultant, and (3) employ an architect to prepare plans for a proposed building.

Section 182.200, Paragraph No. 4, directs that the library board of a city library shall have ". . . exclusive control of the expenditure of all moneys collected to the credit of the library fund, and of the construction of any library building . . ." This clearly infers that the board has power to construct a library building.

Section 182.291, Paragraph No. 3, contains the following language: ". . . Except as provided in this section the city-county board shall function as provided in sections 182.190 to 182.230." While the legislative language used is that the board shall "function", we believe that the legislative intent is somewhat broader than the strict meaning of the word "function". It appears from the language that the legislative intent was that the city-county library board should not only "function" as provided in Sections 182.190 to 182.230 for city library boards, but should also have the powers and the authority that such city boards have. Therefore, we hold, that the city-county board has power to construct a library building.

Turning now to the question of the power or authority of the board to incur indebtedness for the purchase of land for a library building site or employing an architect to make plans for a building, we consider the application of Article VI, Section 26(a), of the Constitution, which provides:

"No county, city, incorporated town or village, school district or other political corporation or subdivision of the state shall become indebted in an amount exceeding in any year the income and revenue provided for such year plus any unencumbered balances from previous years, except as otherwise provided in this Constitution."

The Jefferson City-Cole County library district is a political corporation within the meaning of this provision of the Constitution. This is so because Section 182.200, Paragraph No. 5, which makes a city library board a body corporate is adopted in Section 182.291 respecting the functions of the city-county library board.

November 20, 1964

Therefore, the Jefferson City-Cole County city library board is prohibited from becoming indebted in any year in an amount exceeding its income and revenue provided for such year plus any unencumbered balances from previous years. We are not advised as to the funds available to the board in any particular year, yet we believe that the board will be able to apply the above principle with its own knowledge of the funds available to it in any particular year.

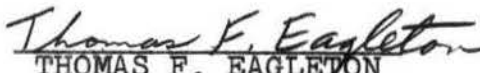
It is our opinion, however, that contracts could be entered into in any one year for a consultant or an architect, provided the services contracted for were not to be performed until the following year in which revenues were available and provided no payment was to be made for such service until the following year, and provided further that the contract did not exceed the revenue available for the year in which the services are to be performed. The courts of this state have held that executory contracts may be made if the contracts provide that the services contracted for are not to be paid until the services are actually performed. Tate v. School District No. 11 of Gentry County, 324 Mo. 477, 23 S. W. 2d 1013; Saleno v. Neosho, 127 Mo. 627, 30 S. W. 190.

CONCLUSION

The Jefferson City-Cole County library board is authorized to construct a library building and employ the services of architects in connection therewith, provided they do not violate the prohibition of Article VI, Section 26(a), of the Constitution, which prohibits the board from incurring any indebtedness in any year exceeding the income and revenue provided for such year plus any unencumbered balances from any previous years.

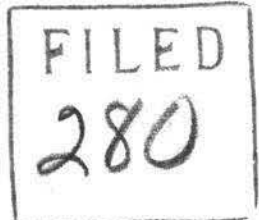
The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

JGS/cs

August 14, 1964



Honorable Leon F. Burton
Secretary-Treasurer
State Board of Barber Examiners
131 Capitol Building
Jefferson City, Missouri

Dear Mr. Burton:

This letter is in answer to your request for an opinion of this office dated July 25, 1964. You inquire whether a barber could take the Missouri State Barber Examination who has practiced in another state or states for a period of two years but has not been licensed in such state or states.

The applicable statute is Section 328.080, Subparagraph 2 (3) RSMo., setting out the qualifications of an applicant for the state barber examination as follows:

"(3) He has studied for at least one thousand hours in a period of not less than six months in a properly appointed and conducted barber school under the direct supervision of an instructor licensed as such by the board, and spent an additional eighteen months as a registered apprentice under a qualified practicing barber or has practiced the trade in another state for at least two years;"

The statute provides two alternatives. The first alternative is that the applicant must have studied at

Honorable Leon F. Burton

least one thousand hours in a period of six months in a proper barber school under proper supervision, licensed by the Missouri board and in addition must have spent eighteen months as an apprentice. The apprenticeship does not have to be in Missouri, but the study does have to be in a school licensed by the Missouri Board of Barber Examiners. The second alternative states, "or has practiced the trade in another state for at least two years". This implies lawful practice of the trade in another state. Consequently, if the state wherein the applicant practiced required by its statutes that barbers must be licensed during the time of the applicant's practice there, then such applicant must have practiced there as a licensed barber in order to be eligible to take the Missouri examination, or if an apprentice may lawfully practice in such state, his time as an apprentice would count as time practiced in such state. If such state did not require such licensing of barbers during the time of his practice, then the applicant must prove that he actually practiced the trade of barbering there for at least two years.

The question remains, what proof would be acceptable to the board of barber examiners as to the fact of such practice by an applicant in another state. The evidence presented should be credible and substantial. No set of rules can be stated which would cover every instance and each case would have to be considered on its individual merits. An example of sufficient proof in a proper case might be affidavits from substantial and reputable members of the community where the applicant claims to have practiced stating that the affiants have personal knowledge that the applicant practiced the trade of barbering in the community for a stated period of time, at least two years in length, giving the location of the shop or shops where applicant worked and stating to the knowledge of the affiant that applicant was actively engaged in the trade of barbering during the period. The statements contained in the affidavits should be verified by reasonable investigation by the Board.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

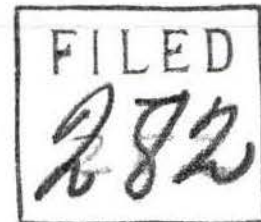
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SOCIAL SECURITY:
MISSOURI BAR:
STATE EMPLOYEE:
INSTRUMENTALITY:
STATE INSTRUMENTALITY:
JURISTIC ENTITY:

The Missouri Bar is an instrumentality of the state as defined in Section 105.300 (7) RSMo. It is a juristic entity, legally separate and distinct from the state, whose employees are not state employees.

Opinion No. 282

September 28, 1964



Honorable Charles D. Trigg
Comptroller and Budget Director
State Capitol
Jefferson City, Missouri

Dear Mr. Trigg:

You have requested the official opinion of this office on the following question:

"Is the Missouri Bar Integrated an instrumentality within the meaning of the social security law."

Sections 105.300 to 105.440, inclusive, RSMo, herein sometimes called the Act, were enacted in 1951 for the purpose of extending Social Security benefits to state employees and, under the conditions prescribed by the Act, to employees of political subdivisions and instrumentalities both of the state and of its political subdivisions. Section 105.300 defines various terms used in the Act. Paragraph 7 contains the following definition of instrumentality:

"'Instrumentality', an instrumentality of a state or of one or more of its political subdivisions but only if such instrumentality is a juristic entity which is legally separate and distinct from the state or such political subdivision and whose employees are not by virtue of their relation to such juristic entity employees of the state or such subdivision;"

Honorable Charles D. Trigg

The Missouri Bar was created by a rule of the Missouri Supreme Court. Rule 7 entitled "Establishing and Providing for the Government of the Missouri Bar" contains a number of detailed provisions relating to the creation and organization of the Bar. The Missouri Bar, so established by the Court, is integrated, so that all lawyers enrolled to practice in this state are automatically and by compulsion members of the Bar. Under Rule 6.01, with certain exceptions not here relevant, each person licensed to practice in Missouri is required to pay an annual enrollment fee, the major portion of which is paid to the Missouri Bar.

Integrated bars have been established in many states. In some, such Bars have been created by legislative enactment while, in others, the highest court of the state acted either independently of the legislature or at its request. However, we believe it immaterial whether the integration of the Bar is by statute or by the court acting independently thereof. In either case, the essential nature and purpose of the integrated Bar is the same.

Although an order or rule creating a state Bar is legislative in character (See Lathrop v. Donahue, 367 US 820, 1.c. 824), the courts have held, and we think properly so, that integration is nevertheless a judicial function and is exercised by the courts pursuant to their inherent power to regulate the bar of the state. Re Nebraska State Bar Association, 133 Nebr. 283, 275 N.W. 265, 114 A.L.R. 151. Although not all state bars have the same powers in all respects, they do have the common purpose and function of furthering the state's legitimate interest in improving the quality of professional services available to the people of the state. If the courts were not held to have such inherent power to integrate the bar as a means, inter alia, of regulating and elevating the standards of the legal profession, the result would be to deprive the court of an effective means of exercising its authority over the bar. It follows then that the integration of a state bar relates to matters which are peculiarly within the authority of the judiciary.

In Board of Commissioners of Mississippi State Bar v. Collins, 59 So. 2d 351, the Mississippi Supreme Court ruled the nature of the state bar in Mississippi as follows (59 So. 2d, 1.c. 355):

Honorable Charles D. Trigg

"In view of its membership, its functions and the purposes of its creation, the State Bar, created by the act, possesses none of the attributes of a private corporation. And the State Bar act is in no sense a local or private act. It is general in its application and applies to all lawyers in the state who are actively engaged in the practice of law. The State Bar is in reality an agency of the state created in the exercise of the police power of the state for the purpose of regulating more effectively the practice of law and for the purpose of encouraging the study of improved methods of procedure and practice in the courts." [Emphasis added.]

Although in Mississippi the state bar was integrated by act of the legislature, this fact has no bearing upon the ultimate nature of the bar nor does it serve to distinguish the Missouri Bar from the Mississippi Bar. Once it is conceded, as we hold and the courts generally have held, that the courts have the inherent power to establish a state bar, it follows that the nature of the bar so established is no different from the nature of bars created by act of the legislature.

In an annotation in 114 A.L.R. 151, it is stated:

"While the statutes or court rules under which they have been organized differ to some extent, integrated bars have the common characteristics of being organized by the state or under the direction of the state, and of being under its direct control, and in effect they are governmental bodies."

The specific question relating to the status of a state bar was posed in State Bar of Michigan v. City of Lansing, 361 Mich. 185, 105 NW2d 131, as follows, 1.c. 135:

Honorable Charles D. Trigg

"This appeal involves the question as to the status of plaintiff: Is it, as defendants seem to contend, actually a private organization made up of the members of the bar? Or is it, on the contrary, a governmental agency created for a specific purpose logically falling within the scope of the judiciary?"

In answering this question, the court concluded that the bar was a governmental agency created to assist in the performance of functions that pertain to the judiciary.

It follows from the foregoing that the Missouri Bar is not a mere voluntary private association of lawyers. Unless the integrated Bar were in fact public in nature and purpose, neither the legislature nor the court could validly create such an agency. In Lathrop v. Donahue, 367 US 820, above cited, the Supreme Court of the United States clearly held that the creation of a state bar was the exercise of a governmental function.

There is no all-inclusive definition of the term "instrumentality". See Unemployment Compensation Commission of North Carolina v. Wachovia Bank and Trust Company, 215 N.C. 491, 2 S.E.2d 592. In Falls City Brewing Company v. Reeves, 40 F. Supp. 35, 1.c. 39, in holding that a military post exchange was a governmental instrumentality and therefore tax exempt, the court stated:

"'Instrumentality' is defined by Webster as 'condition of being an instrument; subordinate or auxiliary agency; agency of anything as means to an end.' The same word is defined in 32 Corpus Juris, page 947, as 'anything used as a means of an agency; that which is instrumental; the quality or condition of being instrumental.'"

Pointing out that post exchanges are not purely voluntary organizations, the court held that they are set up, organized and operated pursuant to military authority. So, too, the Missouri Bar, having been set up, organized and operated pursuant to court authority for the more effective exercise of the judicial authority over the

Honorable Charles D. Trigg

legal profession, the Bar is therefore an agency or instrumentality of the state, having those powers, purposes and functions which have been delegated and conferred upon it by the Supreme Court.

Your question involves the construction and application of Section 105.300 (7), defining the term "instrumentality" as used in the statute of which it is a part. Not all instrumentalities may be covered as such under the Act, not even all instrumentalities of a court. There can be no question but that the court may appoint a referee or a special commissioner to aid or assist the court in the performance of its judicial functions, and that such referee or commissioner is in fact a judicial instrumentality in the broad sense of the term. However, (as our discussion will make clear) such an instrumentality would not be within the definition contained in paragraph 7 of Section 105.300.

We note that Section 105.350, RSMo, authorizes an instrumentality of the state to submit a plan for approval by the state agency for extending Social Security benefits to its employees, and that such instrumentalities are authorized to enter into and ratify any such agreement upon its approval by such agency. Before any plan may be approved by the agency, it must first be found that the plan is in conformity with the requirements provided by the regulations of the state agency except that no plan may be approved unless, inter alia, it specifies the source or sources from which the funds necessary to make the payments required by Section 105.370 are to be derived and contains reasonable assurance that such source will be adequate for such purposes. In addition the plan must provide for methods of administration of the plan by the instrumentality as are found by the state agency to be necessary for the proper and efficient administration of the plan. In addition, reports must be made from time to time. Finally, the state agency must be authorized to terminate the plan of coverage if it finds there has been a failure to substantially comply with any provision thereof.

Section 105.370, above referred to, requires each instrumentality whose plan has been approved to pay to the trustee contributions in the amounts and at the rates

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specified in the agreement entered into by the state agency, and authorizes the instrumentality to impose upon its employees a contribution with respect to their wages and to deduct the amount thereof from wages when paid.

From the foregoing, it is evident that an instrumentality which does not have a governing body with authority to act on behalf of the instrumentality and submit a plan which would insure that funds will be available to pay both the employer and employee contributions, would not be an instrumentality within the definition of Section 105.300 (7). On the other hand, an instrumentality which does have such power and authority (as does the Missouri Bar) would ordinarily be an instrumentality of the kind contemplated by the legislature.

With these preliminary observations, we next consider the elements constituting an instrumentality which has authority to submit a plan to extend Social Security coverage to its employees within the meaning and purpose of the Act. The instrumentality must be a juristic entity which is legally separate and distinct from the state. What is a juristic entity? Webster defines juristic as "relating to, created by, or recognized in law." A juristic person is defined as "a body of persons, a corporation, a partnership, or other legal entity that is recognized by law as the subject of rights and duties." The word "entity", just as is true with respect to the word "instrumentality", has no all-inclusive definition. In Finston v. Unemployment Compensation Commission, 132 N.J.L. 276, 39 A. 2d 697, 1.c. 698, it was said:

"So, too, 'entity' is a word with elastic application. It is defined as something which has reality and distinctness of being; but that reality and distinctness may be either in fact or thought. (Webster's New International Dictionary)"

It is the opinion of this office that the Missouri Bar is a juristic entity. It has reality and distinctness of being, separate and apart from its members. It was

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created by and is recognized in law. The Missouri Bar, as such, functions under the rules of the Supreme Court, and these rules constitute, in effect, its charter. It is an artificial public body separate and distinct from the individual attorneys who constitute its membership. It is described by the rules of the court as the official organization of all Missouri lawyers. It has perpetual existence, subject only to the will of its creator. That is equally true of a private not-for-profit corporation. It has a representative Board of Governors through which its affairs are managed. Within the scope of the powers and authority conferred upon it by court rule, and subject only to the power of referendum by its members under Rule 7.06, the Bar functions as an independent body, with power to contract and to employ necessary assistants and to provide for and fix their duties and compensation.

True, the Court might change the rules, but unless it does so, the Bar is not subject to the control of the Court. So, too, the Legislature might change statutes under which independent instrumentalities created by statute operate. However, that ultimate power does not make the instrumentality any the less independent. Any present determination respecting the status of an instrumentality can and must be made only on the basis of the existing statutes or rules.

Although in the absolute sense, no instrumentality can ever be completely separate and distinct from its creator, if for no other reason than that its powers may be modified or itself abolished, it is obvious that what the legislature intended was a realistic concept, and this is demonstrated by the use of the word "legally". We are in accord with the reasoning of Virginia Mason Hospital Association v. Larson, 9 Wash. 2d 284, 114 P. 2d. 976, 986 in which the Supreme Court of Washington held:

"We do not believe that lack of independence from other institutions is the test of whether an institution is a separate entity."

Thus, although a corporation in the absolute sense is not separate and distinct from its members and stockholders, no one would question that, within the scope of the powers

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conferred upon it by the state and by its charter, it is "legally" separate from such members and stockholders. Rule 7 operates to establish an entity with authority to act independently and separate from the court which created such instrumentality. This entity, the Missouri Bar, is legally separate and distinct from the state. It is no part of the apparatus of the state government.

Finally, paragraph 7 of Section 105.300 contains the requirement that the employees of the instrumentality must not by virtue of their relation to such juristic entity be employees of the state. Here, too, is involved the matter of legislative intention. The legislature has created a number of instrumentalities, such as state boards, commissions, and the like, with power to contract and otherwise having the characteristics of public quasi-corporations. However, as to most of such bodies at least, their employees are not only authorized by statute, but the legislature appropriates the funds out of which such employees are paid, and for such reason the employees of such instrumentalities are employees of the state "by virtue of their relation to such juristic entity". Not so with respect to the Missouri Bar. The legislature not only had no part in the creation of the Bar, it has enacted no statutes authorizing the employment of any employees by the Bar nor has it appropriated any money to be used for the payment of wages to such employees.

The clear legislative intent derived from a reading of the Act as a whole, and in particular, Section 105.340 is that a state employee is one whose employment is authorized by statute, who is paid out of state-appropriated funds, and whose required contributions are to be deducted from his state-paid wages by the trustee of the state (state treasurer), the same official who disburses state funds with the approval of the very state agency which administers the agreement. The Supreme Court itself has a number of employees, but the employment of these persons is authorized by law, and the legislature has appropriated funds to pay their compensation. This is a legislative power and not the exercise of any judicial function. We took note above of referees and special commissioners appointed from time to time pursuant to the inherent power of the court. These instrumentalities are properly within the power of the court to create but they do not become, by reason of the exercise of such power, state employees.

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Although, as we have held, the Court has the power to create a state bar as an instrumentality of the state, and has the power to require every enrolled attorney to pay a fee for Bar purposes, this does not mean that in so doing the Court thereby judicially creates the relationship of state employee as between the employees of its instrumentality and the state itself. Nothing in Rule 7 evidences such an intention. Clearly, the purpose of Rule 7 is to establish an agency or instrumentality which will operate as an independent entity within the framework of its court-made charter. The employees of the Missouri Bar become such only by authority of its elected Board of Governors which has sole and exclusive authority, completely independent of the legislature, over its employees and the compensation they are paid. All salaries are paid out of the Missouri Bar Fund. None of such employees are state employees.

CONCLUSION

It is the opinion of this office that the Missouri Bar is an instrumentality within the meaning of paragraph 7 of Section 105.300, RSMo.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,

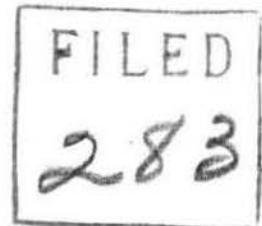

THOMAS F. EAGLETON
Attorney General

INCOMPATIBILITY:
OFFICERS:
COUNTY HIGHWAY ENGINEER:

It is incompatible for the same person to hold the office of county highway engineer of a county of the third class and to also be employed as a laborer by the same county road system.

OPINION NO. 283

September 9, 1964



Mr. Robert L. Hyder
Chief Counsel
Missouri State Highway Commission
Jefferson City, Missouri 65102

Dear Mr. Hyder:

This is in response to your letter of August 7, 1964, requesting advice from this office. Your letter reads as follows:

"A recent question in connection with the administration of the County Aid Road Trust Fund program has arisen which I feel calls for a determination by your office.

"In a county of the third class, an individual has been employed as County Highway Engineer. During the period of such employment and in examining an itemized statement of cost submitted by the same county for payment from the County Aid Road Trust Fund, our employees have found that this same individual has been employed as a laborer for 738½ hours at a specified price per hour by the County Court in connection with the maintenance of the County Road System.

Mr. Robert L. Hyder

"The State Highway Commission would appreciate your advising as to whether or not the employment as the County Highway Engineer is inconsistent with employment as a laborer by the County Court of the same county and whether we should direct the attention of the County Court to the matter."

The Missouri Supreme Court has elaborated on the compatibility of the same person holding two different offices simultaneously. In State ex rel. Walker v. Bus, 135 Mo. 325, at page 338, the court states the general rule:

" * * * At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him."

(Emphasis added.)

Let us now consider the duties conferred upon county highway engineers of class three counties as enumerated by Sections 61.160 to 61.310, RSMo 1959. Section 61.220 gives the county highway engineer direct supervisory duties over the maintenance of county roads:

"The county highway engineer shall have direct supervision over all public roads of the county, * * *. He shall also supervise the construction and maintenance of all roads, culverts and bridges. * * *"

(Emphasis added.)

Mr. Robert L. Hyder

Section 61.240 gives the county highway engineer inspection duties:

"The county highway engineer shall, personally or by deputy, inspect the roads, culverts and bridges of every district in the county as often as practicable, and upon written complaint of three freeholders in any district of the bad or dangerous condition of the roads, bridges or culverts of the district, or of the neglect of duty by any road overseer of the district, or of neglect of any contractor on roads let by contract, the county highway engineer at once shall visit the road and investigate the complaint, and if found necessary at once shall direct the overseer of the district to place the road in good condition."

Sections 61.250 and 61.260 give the highway engineer power over road overseers as to expenditure of funds and improvement of roads. Sections 61.270 and 61.280 require the county highway engineer to report to the county court with recommendations as to what actions should be taken by the court for the repair or improvement of county roads and what part of this improvement should be let under contract.

We see from the foregoing that the county highway engineer is given the duty of supervision of the county construction and maintenance of roads. When the same individual is employed, not only as supervisor but as a laborer by the county court in connection with the maintenance of the county road system, an apparent conflict of interest arises which the Missouri Supreme Court condemns as improper.

CONCLUSION

From the foregoing, it is clear that there is an incompatibility in the same person holding the office of

Mr. Robert L. Hyder

county highway engineer of a third class county and being employed by the county court as a laborer in connection with the maintenance of the same county road system.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary A. Tatlow.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

ELECTION:
NONPARTISAN CANDIDATES:

Chapter 120, RSMo 1959, authorizes candidacy through the usual primary election process or by nominating petitions.

Opinion No. 284

September 16, 1964



Honorable David J. Dixon
Prosecuting Attorney
Johnson County Courthouse
Warrensburg, Missouri

Dear Mr. Dixon:

In your recent letter you inquire as to whether a person may, within the time permitted for filing as a candidate for the primary election, file as a nonpartisan candidate under the provisions of Section 120.360, RSMo 1959, without previously filing petitions for nomination, and be entitled to be placed on the general election ballot if no other candidates file on the nonpartisan ticket.

We believe that Chapter 120, RSMo 1959, as amended, provides alternative ways for the nomination of nonpartisan candidates. Section 120.360 authorizes a nonpartisan candidate to pay the regular filing fee and seek the nomination on the nonpartisan ticket under the usual primary election procedures. If the candidate elects to follow this procedure, then his name would appear on the general election ballot in accordance with Section 120.430. We believe that these conclusions are supported by the case of State ex rel. Preisler v. Toberman, 269 SW2d 753. In the Preisler case the court said:

"The two methods of nomination are entirely different and are not inconsistent with or repugnant to each other."

In other words, the standard procedure for nominating nonpartisan candidates by way of a primary election continues to be authorized by the above statutory provisions, notwithstanding Sections 120.180 to 120.230, which expressly authorize the nomination of certain candidates by nominating petitions.

Honorable David J. Dixon

CONCLUSION

The nomination of independent or nonpartisan candidates may be accomplished through the usual primary election process or by way of nominating petitions as authorized by Section 120.180, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Clyde Burch.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

CERTIFIED PUBLIC ACCOUNTANTS:
ACCOUNTANTS:
LICENSES:
LICENSE TAX:
CITIES, TOWNS, AND VILLAGES:

A third class city cannot
levy a license tax on
accountants.

OPINION NO. 285

December 4, 1964

Honorable Thomas T. Keating
Representative, Pettis County
Sedalia Trust Building
Sedalia, Missouri



Dear Mr. Keating:

This is in reply to your request for an opinion in your letter dated August 11, 1964, which reads as follows:

"I have been asked for an interpretation of Section 71.620 R.S. Mo 1959 which exempts certain professions from taxation by municipalities.

"The question which has arisen concerns Certified Public Accountants. In the city of Sedalia a C.P.A. firm from the Jackson County area opens an office for the four and five month period of each year during which income tax work is prevalent. It is my understanding that the office in Sedalia is a branch office of their main office in Jackson County, but that the personnel in the Sedalia office are not Certified Public Accountants.

"Also, in the city of Sedalia there is operating an accounting firm owned by two Certified Public Accountants. One of them lives in Springfield, Missouri, and operates an office of this firm there and the other lives here in Sedalia and operates this office here. They employ approximately 15 persons in carrying on their duties as Certified Public Accountants.

"I would appreciate your further advising whether or not either of the above operations does not come within the meaning of Section 71.620 as far as taxation by the city of Sedalia is concerned."

In your opinion request you asked for an interpretation of Section 71.620, RSMo Cum. Supp. 1963, and whether the factual situation described falls within its prohibitions. Irrespective of whether it falls under Section 71.620, it is our opinion that the city of Sedalia, due to other statutory provisions, cannot levy a license tax on accountants.

The authority of the city of Sedalia to impose a license or occupation tax on certain businesses is provided by Section 94.110, RSMo 1959. Accountants are not included in the various occupations listed therein. A city has no inherent right to levy and collect taxes. The authority for a city to tax must be expressly granted or necessarily incident to the powers conferred and in case of doubt, must be denied. In the case of *Moots v. City of Trenton*, 214 S.W. 2d 31, 33, later cited with approval by the court in *Holland Furnace Company v. City of Chaffee*, 279 S.W. 2d 63, the Supreme Court stated the law as follows:

"In ruling the point in the *Siemen's* case, the court pointed out that a city has no inherent power to tax; that such power rests primarily in the state but may be delegated by constitutional provision or by statutory enactment; that the authority for a city to tax must be expressly granted or necessarily incident to the powers conferred and in case of doubt, the power to tax is denied. * * * We rule that the city of Trenton was not empowered by Section 6986 to levy a license tax upon music machines because such machines were not specifically named therein."

Section 71.610, RSMo 1959, provides that no municipality shall have power to impose a license tax on any business pursuit unless the pursuit is especially named as taxable in the charter of the municipality or unless conferred by statute. Since the authority to require accountants to obtain a license has not been granted by Section 94.110, it is the opinion of this office that the city of Sedalia has no authority to require accountants to pay a fee to obtain such a license.

CONCLUSION

It is the opinion of this office that the city of Sedalia, a third class city, cannot levy a license tax on accountants.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary A. Tatlow.

Very truly yours,

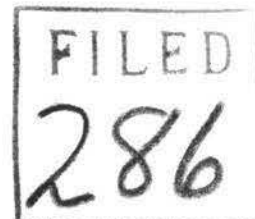

THOMAS F. EAGLETON
Attorney General

AIRPORTS: The mere zoning of land as "Small Farm"
BI-STATE DEVELOPMENT: by the City of Fenton would not preclude
CITIES: (1) the City or County of St. Louis,
COUNTIES: (2) the City and County acting jointly, or
ZONING: (3) the Bi-State Development Agency from
condemning such land for airport purposes.

OPINION NO. 286

December 14, 1964

Honorable Robert O. Snyder
State Representative
241 East Argonne Drive
Kirkwood 22, Missouri



Dear Mr. Snyder:

This is in answer to your recent request for an opinion of this office asking whether land zoned for Small Farm in the City of Fenton, Missouri, a city of the fourth class in St. Louis County, could be condemned for airport purposes by (1) the City or County of St. Louis, (2) a joint City-County operation, or (3) the Bi-State Development Agency.

(1) The operation of airports by cities and counties is controlled by Sections 305.170 and 305.180, RSMo, respectively. Section 305.190, RSMo, states that the acquisition of land is a public necessity for which cities, villages, towns, and counties have the right to acquire property for an airport by eminent domain, if necessary. It is here set out:

"Any lands acquired, owned, controlled, or occupied by such cities, villages, towns or counties for the purposes enumerated in sections 305.170 and 305.180 hereof shall and are hereby declared to be acquired, owned, controlled, and occupied for a public purpose and as a matter of public necessity, and such cities, villages, towns, or counties shall have the right to acquire property for such purpose or purposes under the power of eminent domain as and for a public necessity."

Subsection 1 of Section 305.200, RSMo 1959, sets out the procedure under which property can be acquired, using the power of condemnation if necessary, and is here set out:

Honorable Robert O. Snyder

"Any county, city or city under special charter shall have the power to acquire by purchase, property for an airport or landing field or addition thereto, and if unable to agree with the owners on the terms thereof, may acquire such property by condemnation in the manner provided by law under which such county or city is authorized to acquire real property for public purposes, or if there be no such law, then in the same manner as is now provided by law for the condemnation of property by any railroad corporation."

Subsection 3 of this Section reads in part as follows:

" . . . Provided, that no airport or landing field shall be established or located in any county, city or city under special charter in violation of any plan or master airport plan or zoning regulation restricting the location of an airport or landing field adopted by the planning commission of any such county, city or city under special charter."

However, this proviso relates only to zoning regulations or a master airport plan restricting the location of an airport. The mere zoning of property for "small farms" or otherwise is not what is contemplated by the statute. Hence, unless there were such a plan or regulation, which in terms relates to the location of airports, and the opinion request does not so state, then the proviso would have no effect at all upon the right of the city or county to establish the airport as contemplated. There is also a serious question as to whether this proviso, which relates to the location of an airport, is valid as within the following title to the act (H.B. 420, 62nd General Assembly, Laws 1943, page 326):

"AN ACT repealing Section 15125 of Article 3 of Chapter 123 of the Revised Statutes of Missouri, 1939, relating to the acquisition of real and personal property and easements or uses therein for airport purposes by counties, cities or cities under special charter, by purchase or condemnation and enacting a new section in lieu thereof to be known as Section 15125 relating to the same subject."

Honorable Robert O. Snyder

(2) A joint City-County operation could be established under Sections 70.210-70.320, RSMo 1959, as amended, which authorize designated political subdivisions of this state to cooperate for the purpose of acquiring and operating any public improvement or facility.

Section 70.240, RSMo 1959, controls the manner by which land may be acquired for any such improvement or facility, and is here set out:

"The parties to such contract or cooperative action or any of them, may acquire, by gift or purchase, or by the power of eminent domain exercised by one or more of the parties thereto in the same manner as now or hereafter provided for corporations created under the law of this state for public use, chapter 523, RSMo, and amendments thereto, the lands necessary or useful for the joint use of the parties for the purposes provided in section 70.220, either within or without the corporate or territorial limits of one or more of the contracting parties, and shall have the power to hold or acquire said lands as tenants in common."

Thus, a city and a county acting jointly would have the same powers as that of a city or county acting alone.

(3) The Bi-State Development Agency was created in 1949 by compact between Missouri and Illinois, with the consent of the Congress. This compact constitutes a contract, and its obligations may not be impaired by either state. Article III of the compact (set forth in Section 70.370, RSMo) and particularly as expanded by Section 70.373, RSMo, and its complementary Illinois law, Ch. 127, Section 63s - 9, Illinois Revised Statutes 1959, expressly grants power to the Bi-State Agency to acquire airports. The Agency is granted the right to condemn property for this or any other purpose of such Agency, the only limitation on such grant of power (other than those mentioned in Section 70.373, which are not here relevant), being that it shall not take property of the state, county, city, borough, village, or other political subdivision without the consent thereof. Thus, no municipality would have the right to thwart the plans of the Agency by zoning regulations which might limit the right of the Agency to operate an airport, or other authorized facility, at such place or places as in its discretion the Agency deems desirable for the proper development and welfare of the District. The zoning restrictions are

Honorable Robert O. Snyder

completely inoperative insofar as the Bi-State Agency is concerned, in respect of its right to establish and operate an airport at the place or places it deems proper for the District, even if the zoning restriction in question should be construed otherwise to bar airports in the area in question. Of course, if the city actually owned any part of the area sought to be taken by the Agency for airport purposes, the compact would preclude the exercise of the power of eminent domain with respect to such city-owned property (Article III of the Compact, Section 70.370, RSMo.)

The overwhelming weight of authority is that zoning ordinances are inapplicable to governmental agencies where the use of the property is pursuant to a governmental function. 61 ALR 2d. 988. *Dysart v. City of St. Louis*, 321 Mo. 514, 11 SW2d 1045, refers to "the governmental nature of the function" of operating an airport. Cases referred to in the A.L.R. annotation, which specifically relate to airports, have held that zoning ordinances are inapplicable to the use by political subdivisions of property for airport purposes, the use thereof being to subserve public purposes.

Zoning ordinances are primarily intended to regulate the use of private property. Moreover, most of the cases take note of the fact that where the power of eminent domain is granted to acquire property for particular purposes, such as airport operations, a municipality or other local subdivision has no power to restrict the exercise of such power of eminent domain, and hamper and impair the exercise thereof by zoning regulations, particularly in the absence of any express language to such effect. In *State ex rel. St. Louis Union Trust Company v. Ferriss*, 304 SW2d 896, 900, our Supreme Court quoted with approval from *State ex rel. Helsel v. Board of County Commissioners of Cuyahoga County, Ohio*, Com. Pl. 1947, 79 N.E. 2d 698, a case involving an airport, which had held that municipal zoning restrictions could not limit or prevent the public use for which the land was taken and thereby restrict the exercise of the power of eminent domain.

The only limitation upon the exercise of the right of eminent domain by cities and counties in this state is that contained in the proviso of Subsection 3 of Section 305.200, RSMo 1959, which, if valid, would bar the establishment of an airport or landing field contrary to the provisions of the zoning regulations or master plan restricting the location thereof. As noted above, your letter does not indicate that any such restriction, within the meaning of the proviso, has been adopted or is in effect. In any event, however, none of the provisions of this subsection are in anywise applicable to the Bi-State Development Agency.

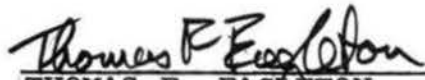
Honorable Robert O. Snyder

CONCLUSION

Therefore, it is the opinion of this office that the mere zoning of land as "Small Farm" by the City of Fenton would not preclude (1) the City or County of St. Louis, (2) the City and County acting jointly, or (3) the Bi-State Development Agency from condemning such land for airport purposes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas E. Eichhorst.

Very truly yours,



THOMAS F. EAGLETON
Attorney General

September 24, 1964



Honorable Charles G. Hyler
Prosecuting Attorney
St. Francois County
Courthouse
Farmington, Missouri

Dear Sir:

This is in reply to your request for an official opinion dated August 13, 1964, as to what agency can make and enforce traffic regulations on the streets and roads within the grounds of State Hospital No. 4 at Farmington, Missouri. We assume that you are inquiring about the private roads within the hospital grounds and that you want to know what, if any, agency can make and enforce regulations which will be cognizable as a misdemeanor.

While we believe that the Department of Public Health and Welfare or the Division of Mental Diseases can make requirements regulating traffic and use of streets in the area of the hospital, yet we have found no statute in which the Department of Public Health and Welfare or the Division of Mental Diseases have been specifically delegated authority to make rules regulating traffic, or use of streets in the area of the hospital. We conclude therefore that there are no applicable statutes and there can be no criminal prosecution for a violation thereof.

For your information, we note that this authority has been delegated to the Director of Public Buildings in the capital city by Section 8.172, RSMo 1959.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CB:df

September 30, 1964



Mr. Leon F. Burton
Secretary-Treasurer
State Board of Barber Examiners
for State of Missouri
131 Capitol Building
Jefferson City, Missouri

Dear Mr. Burton:

This letter is in answer to your request for an opinion of this office upon the question whether an applicant is eligible to take the state barber examination if he can show proof that he practiced the trade of barbering in Missouri prior to 1921 but who never secured a license to practice the trade in Missouri.

Section 10132, RSMo 1939, provided:

"Every person now engaged in the occupation of barbering in this state shall, within ninety days after the approval of this law, file with the secretary of said board a written statement, setting forth his name, residence and the length of time during which and the place where he has practiced such occupation, and shall pay to the treasurer of said board \$2.00; and a certificate of registration entitling him to practice the said occupation for the fiscal year ending January 31, 1922, thereupon shall be issued to him, and the holders of such certificates shall, annually, on or before the expiration of their respective certificates, make application for the renewal of same * * *. * * any barber

Mr. Leon F. Burton

failing to renew his certificate of registration for a period exceeding two years and desiring to be re-registered as a barber in this state will be required to appear before said board and pass a satisfactory examination * * *."

The quoted statute allowed a period of ninety days' time to anyone who had been a barber in Missouri at the time of the enactment of the law in 1921 within which to secure a license to practice the trade without an examination, and further provided that anyone who failed to "renew his certificate of registration" for a period exceeding two years would have to pass the examination before being issued a license.

Your question does not involve one who failed to renew his certificate, but one who never obtained a certificate under the provisions of the above statute, although he was legally following the trade of barbering in Missouri prior to passage of the statute.

Section 328.080, subparagraph 2(3), RSMo, sets out the qualifications of an applicant for the state barber examination:

"(3) He has studied for at least one thousand hours in a period of not less than six months in a properly appointed and conducted barber school under the direct supervision of an instructor licensed as such by the board, and spent an additional eighteen months as a registered apprentice under a qualified practicing barber or has practiced the trade in another state for at least two years;"

Under this statute an applicant must have studied at least one thousand hours in a period of not less than six months in a barber school licensed by the Missouri board and must also have spent at least eighteen months as an apprentice. An exception is made in the case of one who has practiced the trade "in another state for at least two

Mr. Leon F. Burton

years". No provision is made for an applicant who practiced barbering in the state of Missouri prior to the effective date of the licensing statute.

Under the plain provisions of the cited statutes, the applicant described in your question would not be eligible to take the barber examination, because he has not undergone the prescribed schooling and apprenticeship and he does not come within the exception provided for those who have practiced the trade in another state for at least two years.

While this construction of the statute may produce some unfortunate and perhaps unfair results, yet the legislature has seen fit to require all residents of Missouri to have certain prescribed schooling and training. This, the legislature had power to do. If unfair results occur, the legislature may change it. However, changes in the law cannot be accomplished by interpretation which is contrary to the manifest meaning of the statute.

We believe that an applicant is ineligible to take the examination of the State Board of Barber Examiners of Missouri, even if he can show proof that he was a barber in Missouri prior to the time that barbers were required to obtain a license in this state, unless the applicant has undergone the training and apprenticeship required by the Missouri statutes or has practiced the trade of a barber in another state for at least two years.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

DLR:lt

COUNTIES: County hospital, established under
COUNTY COURTS: Section 205.350, can be operated only
COUNTY HOSPITALS: by county court, not by board of
HOSPITALS: trustees or nonprofit corporation.

August 19, 1964

OPINION NO. 289

Honorable John E. Kelley
County Counselor
Jackson County
Jackson County Courthouse
Kansas City, Missouri 64106



Dear Mr. Kelley:

This is in answer to your letter of recent date in which you state that the Jackson County Hospital was established under what is now Section 205.350, RSMo, and you ask the question, "Will you please give us an opinion as to whether our hospital can operate under a Board of Trustees, in view of the fact that it was established under section 205.350 or a similar prior statute, or whether or not it can be operated by a non-profit corporation."

Sections 205.350, 205.360 and 205.370, RSMo, provide as follows:

"205.350. County court may purchase land for county hospitals--issuance of bonds.--The county court of any county in this state is hereby authorized to purchase, not exceeding one hundred and sixty acres of land, and locate, build and maintain thereon a county hospital. Bonds may be issued therefor in accordance with the general law governing the issuance of bonds by counties.

"205.360. County poor to be kept in county hospital.--Whenever a county hospital is established and built by

Honorable John E. Kelley

the county court, as provided in section 205.350, it shall be the duty of such county court to place therein all of the poor persons that the county court shall deem proper to place in said county hospital, who shall be kept there and treated.

"205.370. County court to make rules and regulations--expenses, how paid.--The county court of any such county shall make all rules and regulations for the government of such a hospital, appoint and employ such officers and attendants as in their judgment may be proper, prescribe their duties and fix their compensation. The expenses of maintaining such hospital, including the compensation of officers and employees thereof, shall be paid out of the general revenue fund of such counties, or from the same sources as are provided by law for caring for the poor by counties."

It can be seen from the provisions of Section 205.370 that the duty is placed upon the county court to make rules and regulations for such hospital and to appoint and employ officers and attendants as may be proper, prescribe the duties and fix the compensation of such officers and attendants.

The powers of county courts are succinctly set forth by the Supreme Court of Missouri in the case of Lancaster v. County of Atchison, 180 S.W. 2d 706. The court said at l.c. 708:

"The county courts are not the general agents of the counties or of the state. Their powers are limited and defined by law. These statutes constitute their warrant of attorney. Whenever they step outside of and beyond this statutory authority their acts are void." * * *

Honorable John E. Kelley

"Both parties to this suit agree that counties, like other public corporations, 'can exercise the following powers and no others: (1) those granted in express words; (2) those necessarily or fairly implied in or incident to the powers expressly granted; (3) those essential to the declared objects and purposes of the corporation--not simply convenient, but indispensable. Any fair, reasonable doubt concerning the existence of power is resolved by the courts against the corporation and the power is denied.' * * *"

The court further said, l.c. 709:

"* * * Where the statute (Section 8548) 'limits the doing of a particular thing in a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done.' * * * In other words, there can never be an implied power given a county or other public corporation when there is an express power."

In view of the statutory duty expressly placed upon the county court to make rules and regulations for such hospital and to employ personnel to operate the hospital, prescribe the duties, and fix the compensation of such personnel, it is our view that such statutory duty cannot be delegated to a nonprofit corporation or to a board of trustees by such county court.

It is clear that the delegation to a nonprofit corporation or board of trustees of the authority to operate a county hospital established under Section 205.350, RSMo, is not indispensable to the operation of such hospital.

CONCLUSION

It is the opinion of this office that a county court has the statutory duty to operate a county hospital established under the provisions of Section 205.350, RSMo, and

Honorable John E. Kelley

that the county court is without authority to authorize a nonprofit corporation or a board of trustees to take charge of and operate such hospital.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, C. B. Burns, Jr.

Very truly yours,

Thomas F. Eagleton

THOMAS F. EAGLETON
Attorney General

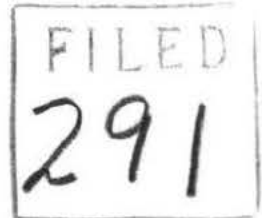
CBB/fh

HARDSHIP DRIVING PRIVILEGE:
MOTOR VEHICLES:
DRIVERS LICENSES:
CIRCUIT JUDGE:
CRIMINAL LAW:
PROSECUTING ATTORNEY:

Circuit court granting limited driving privilege may amend or modify order at any time. Person operating car contrary to limited driving privilege order subject to criminal charge. Conviction of charge of operating contrary to limited driving order is basis for revocation of order by court granting such order.

OPINION NO. 291

December 8, 1964



Honorable Rolin T. Boulware
Prosecuting Attorney
Shelby County
Shelbyville, Missouri

Dear Mr. Boulware:

We have your request for an opinion of this office on certain questions relating to limited driving privileges.

The facts on which your questions are based are as follows:

A resident of Shelby County was convicted of driving while intoxicated. The defendant was sentenced to ninety days in the county jail and his driver's license was revoked. After serving part of the sentence he was paroled. Thereafter he made application to the Circuit Court of Shelby County for the limited privilege of operating a motor vehicle in connection with his employment and for the additional limited privilege of driving his own automobile to and from work. By an order of the Circuit Court the application for limited driving privileges was granted "... for the period stated in the suspension notice from the Department of Revenue, unless hereafter revoked because of violation of the laws by petitioner after the date of this order." The order was also conditioned on the petitioner's obtaining liability insurance on his automobile.

Less than a month after the order was issued the petitioner was arrested for being intoxicated, his parole was revoked, and he was confined to jail to serve the remainder of his sentence. He

*extra copies
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also advised the sheriff that on two occasions he had driven his automobile to places other than his place of employment. Petitioner has not secured liability insurance on his automobile.

Your first inquiry is whether the Circuit Court of Shelby County had jurisdiction to issue the order granting limited driving privileges. The Circuit Court did have such jurisdiction. Enclosed is a copy of an opinion of this office to the Honorable Bill Davenport, dated April 2, 1962, and a copy of a letter opinion to Honorable M. E. Morris, dated February 4, 1964, both holding that the Circuit Court of the county of residence of the petitioner has jurisdiction to grant such a privilege.

Your next question may be restated as follows:

Does the Circuit Court of Shelby County have the power to revoke the order granting limited driving privileges and, if so, what procedure should be employed?

In 1961 the General Assembly passed Section 302.309 (3), RSMo Cum. Supp. 1963, which empowers the court to grant limited driving privileges to one whose license has been revoked. That subsection is as follows:

"When a court having jurisdiction finds that a chauffeur or operator is required to operate a motor vehicle in connection with his business, occupation or employment, the court may grant such limited driving privilege as the circumstances of the case may justify if the court also finds undue hardship on said individual in earning a livelihood, and while so operating a motor vehicle within the restrictions and limitations of such court order such driver shall not be guilty of operating a motor vehicle without a valid driver's license. * * *"

As can be seen from the reading of this subsection, no such privilege could be granted to one adjudged guilty of driving while intoxicated. This prohibition was removed in 1963 with the enactment of Section 564.440 (5), RSMo Cum. Supp. 1963:

"Any other provision in section 302.309, RSMo, to the contrary notwithstanding, when a court having jurisdiction finds that a chauffeur or operator is required to operate a motor vehicle in connection with his business, occupation or employment, the court may grant such limited driving privilege as the circumstances of the case may justify if the court also finds undue hardship on said individual in earning a livelihood; provided, however, no such limited privilege shall be granted after conviction of a second offense of the crime mentioned here."

It can be seen that neither of these sections makes specific mention of the power of the court to amend, modify or revoke a previously entered order granting limited driving privileges. However, both sections clearly vest the court with considerable discretion in determining the circumstances required to warrant the grant of this privilege. To hold that the court may exercise its discretion in making such an order, but that it then loses jurisdiction of the case and may not alter or revoke the order in the light of a possible change in circumstances, would be an absurdity and would serve only to defeat the clear expression of legislative intent. The court having discretion and consequent jurisdiction to make the order granting the limited driving privilege does not thereby and thereafter exhaust its power, authority and jurisdiction over the subject matter of the order.

In 21 C.J.S., Courts § 88, p. 138, it is stated:

"Every court has inherent power to control, and prevent abuse of, its orders or processes and its procedure."

This principle has been recognized by our Supreme Court. In *State ex rel. Gentry v. Becker*, Mo., 174 S.W. 2d 181, 183, the Supreme Court held that certain powers are necessarily inherent in the court:

" . . . 'to do all things that are reasonably necessary for the administration of justice' and in order that it may preserve its existence and function as a court and which powers exist and inhere merely because it is a court and irrespective of legislative or constitutional grant.
 . . . "

See also Clark v. Austin, Mo., 101 S.W. 2d 977, 988 (concurring opinion of Judge Ellison).

The instant case demonstrates the underlying reason for the principle that a court has the inherent power to enforce its own orders. The limited driving privilege granted the petitioner was conditioned upon his obtaining liability insurance. From the facts set out in your letter, it seems clear that the petitioner did not obtain insurance but still purported to drive pursuant to the order. Obviously, the court's order is totally meaningless and the intention of the Legislature is frustrated if the petitioner is free to use the court's order as authority to drive but fails to comply with its terms and conditions. Necessarily, the court must retain jurisdiction to revoke the order in the event of violation or to modify it if there should be a change in circumstances.

It is true, as will be pointed out in answer to your next question, that one who operates a motor vehicle in violation of an order granting limited driving privileges may be prosecuted criminally. However, this cannot be said to be the only remedy by which the court's order may be enforced. The Legislature has vested sole discretion in the court in determining whether or not such privileges shall be granted, whereas the prosecuting attorney has sole discretion in determining whether criminal charges shall be filed. Thus, the court must retain its own enforcement powers, else the legislative grant of discretion would be transferred from the circuit court to the prosecuting attorney.

It is therefore our view that the circuit court retains jurisdiction to modify, amend or revoke its order granting limited driving privileges at any time during which the petitioner's license is under suspension or revocation.

No procedure is specified by law for the revocation of an order granting such a privilege. However, we believe that the requirements of due process oblige the court to hold a hearing at which a violation of the order must be established to the satisfaction of the court prior to revocation or modification. In this connection we again direct your attention to the opinion to the Honorable Bill Davenport previously referred to. While that opinion was concerned with the procedure to be followed in determining whether the privilege should be granted initially, we believe that the remarks made there are also appropriate here, as follows:

"There is no provision in the statute which places a duty with respect to the matter on any public official other than the court, except that the petitioner clearly has the burden of proof to satisfy the court of the conditions and qualifications to bring the petitioner within the purview of the relief sought. Certainly, the court would want to satisfy itself that the applicant has met the qualifications and conditions required by the statute. The court might be satisfied with the proof adduced by the applicant only, or the court might desire some additional investigation, proof or assistance in connection with ascertaining the facts. It would not be inappropriate for the court to either seek the aid of the prosecuting attorney or to appoint a friend of the court to assist the court in ascertaining the facts and determining whether or not the applicant has sufficiently proved to the court that he has met the conditions of the statute and is entitled to the relief sought."

Your third question may be stated as follows:

In the event that the Circuit Court is not empowered to revoke the order, or as an alternative to such procedure, should the prosecuting attorney file a charge against the defendant for driving without a valid operator's license?

As we have stated, the circuit court retains power to revoke the limited driving privilege. However, this privilege acts as a substitute for the valid operator's license otherwise required, and in the event that a person who has been granted such privilege should operate a motor vehicle contrary to the terms of the court's order or beyond the limitations imposed therein, said operation would be without a valid operator's license. In such case a charge of driving without a valid operator's license could be filed by the prosecuting attorney. Revocation by the court and criminal prosecution are concurrent remedies in this situation.

Your fourth question may be stated as follows:

If a charge is filed and the defendant is convicted does this conviction automatically nullify the limited driving privilege granted pursuant to the court order?


We find nothing in either of the statutes previously quoted to the effect that a subsequent conviction shall operate to nullify an order of the court which grants a limited driving privilege. As we have previously pointed out, the power to enforce the order, as such, lies exclusively with the court which granted it. Therefore, it is our view that such an order is not nullified automatically by a subsequent conviction but that some action of the court based upon the conviction is necessary. It would, of course, be the duty of any prosecuting attorney involved in criminal proceedings against one who purports to operate a motor vehicle by virtue of a court order to notify the court which granted the order if the defendant is convicted.

CONCLUSION

1. A circuit court which has granted an order providing for limited driving privileges retains jurisdiction to revoke, amend or modify the order during the time it is in effect.
2. One who has obtained such an order but who operates a motor vehicle contrary to its terms is subject to a criminal charge for driving without a valid operator's license.
3. In the event of a conviction of such a charge the limited driving privilege previously granted is not automatically revoked but must be revoked by the court which originally entered the order granting the privilege.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, James J. Murphy.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

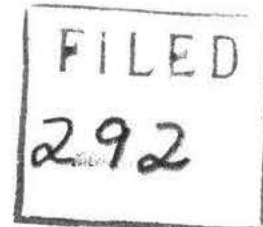
ENCLOSURES

STATE TAX COMMISSION:
TAXATION:
COUNTIES:
SCHOOL DISTRICTS:
ASSESSMENTS:
APPEALS TO STATE TAX COMMISSION:
COUNTY BOARD OF EQUALIZATION:

Neither a county, an officer thereof nor a school district has a right to appeal to the State Tax Commission from a decision of a county board of equalization, determining the assessed valuation of an individual property.

Opinion No. 292

September 16, 1964



State Tax Commission of Missouri
Jefferson Building
Jefferson City, Missouri

ATTENTION: Honorable John A. Williams
Chairman

Gentlemen:

You have requested the opinion of this office as follows:

"This Commission requests an official opinion from your department on whether or not St. Louis County, the Assessor of St. Louis County, the Director of Revenue of St. Louis County or the Berkley School District of St. Louis County may collectively or separately, lawfully appeal from a final decision of the St. Louis County Board of Equalization to this agency."

In our opinion no such appeal is authorized.

The State Tax Commission is created by statute, pursuant to the direction of Article X, Section 14, of the Constitution, with authority, inter alia, to equalize assessments and "under such rules as may be prescribed by law, to hear appeals from local boards in individual cases and, upon such appeal, to correct any assessment which is shown to be unlawful, unfair, arbitrary or capricious".

Implementing the foregoing constitutional provision is Section 138.430, RSMo, paragraph 2 of which provides that: "Every owner of real property . . . shall have the right of appeal from the local boards of equalization under rules prescribed by the state tax commission". This section further prescribes that the "commission shall investigate all such

State Tax Commission of Missouri

appeals and shall correct any assessment which is shown to be unlawful, unfair, improper, arbitrary or capricious".

The foregoing statute grants the right of appeal to the taxpayer, and to the taxpayer only. There is no statute which authorizes a political subdivision to appeal to the State Tax Commission an ad valorem assessment of an individual property. The statutory limitation to taxpayers of the right of appeal to the Commission is in line with the policy of this state at earlier stages of the assessment procedure. Section 137.275, RSMo, provides:

"Every person who thinks himself aggrieved by the assessment of his property may appeal to the county board of equalization, in person, by attorney or agent, or in writing."

Thus, only the taxpayer is given the right to complain of the action of the assessor or the county board of equalization with respect to the amount of his individual assessment. It may well be that the Legislature believed that the assessor in the first instance, and the county board of equalization, on appeal by the taxpayer, would sufficiently protect the interests of the county at the county level.

The State Tax Commission is a state body which hears appeals in a quasi-judicial capacity. Its jurisdiction is prescribed by law and, hence, may be invoked only in the manner and to the extent provided by law. As noted, the law authorizes only an aggrieved taxpayer to appeal to the Commission from a decision of a county board of equalization on the assessment of his property.

We note in this connection that Section 138.470, RSMo, provides in part that "all persons affected, or liable to be affected by review of said assessments thus provided for, may appear and be heard at said hearing" of the appeal. This office has heretofore ruled, in an opinion to the Honorable Raymond R. Roberts, Prosecuting Attorney of St. Francois County, under date of December 15, 1959, copy of which is enclosed herewith, that under the foregoing statutory provision a school district is a "person" entitled to appear and be heard on a taxpayer's appeal filed under Section 138.430.

Hence, once jurisdiction of the appeal has attached, it is not unusual for school districts and various political subdivisions to intervene and become parties to the proceeding

State Tax Commission of Missouri

before the State Tax Commission. Parenthetically, it is to be noted that in the case of In re St. Joseph Lead Company, Mo. Sup., 352 SW2d 656, the Supreme Court expressly declined to rule whether a school district had the right to intervene in such a proceeding, holding that in that case, at least, the county itself adequately represented whatever interest or right the school district might have had.

In the cited case, the Supreme Court held that the county involved in a taxpayer's ad valorem tax appeal to the State Tax Commission is an "interested party" in the "contested case" before the Commission and therefore was an "aggrieved" person entitled to a judicial review of the decision of the Commission. That case simply involved "a matter of statutory construction", namely, the statutes applicable to the right of judicial review of contested cases decided by an administrative agency. So, too, the present question involves only a matter of statutory construction of other statutes. Hence, the mere fact that the county might be aggrieved by a decision of the State Tax Commission on a taxpayer's appeal thereto, and, if so, would have the right to a judicial review of such decision has no bearing whatever upon the question of whether the county, or any officer or political subdivision thereof, has the right to compel the Commission to assume jurisdiction of the case for the purpose of rendering a decision which is subject to judicial review.

The statutes providing for judicial review are wholly inapplicable to the right to obtain an administrative review before the Tax Commission. And in any event we discern no legislative intent in any statute to authorize an appeal to the Commission by any "person" other than the taxpayer and that only with respect to the assessment of individual property.

CONCLUSION

It is the opinion of this office that only a taxpayer may invoke the appellate jurisdiction of the State Tax Commission on a complaint respecting the assessment of his property, and that neither the county, any official thereof nor a school district therein may appeal to the State Tax Commission from a final decision of the county board of equalization determining the assessed valuation of an individual property.

State Tax Commission of Missouri

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

Enclosure

October 5, 1964



Mr. Ralph H. Duggins
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

This letter is in response to yours of August 17, 1964, wherein you inquire as to the procedure for escheating unclaimed assets of a dissolved insurance company.

We understand from your letter and enclosures that the relevant facts are as follows: The Mississippi Valley Life Insurance Company was placed in receivership in April, 1932, with the Superintendent of Insurance as receiver. A final settlement was approved and an order of final distribution made by the Circuit Court of the City of St. Louis in March, 1938. Paragraph VI of the court's order stated, "That if the claimants or assigns of any of said claims cannot be located, or payment cannot be made to them for any reason within thirty days from the date hereof, all such distributions shall be taken over and received by the Superintendent of Insurance of the State of Missouri, to be held by him for such claimants or assigns, or other distribution according to law; . . ." At the present time approximately \$550 of the assets of the dissolved company remain unclaimed.

Section 375.760, RSMo 1959, provides for the final settlement and distribution of assets of a dissolved insurance company. Subsection (4) provides:

"The superintendent shall hold any moneys which are unpaid or unclaimed by the persons entitled thereto for one year after

Honorable Ralph Duggins

final settlement, and at the expiration of such year, he shall pay all unclaimed sums into the state treasury to be held and disposed of as provided by laws for escheats."

Section 5958, RSMo 1929, effective at the time of dissolution of the company here concerned, contained like provisions.

Since a final settlement has been made and one year (actually over 26 years) has expired since the final settlement, it is our opinion that any moneys held by the Superintendent of Insurance which are unclaimed by the persons entitled thereto should be paid into the State treasury and disposed of as escheats.

Monies paid into the state treasury under the escheat laws do not escheat unless unclaimed for 21 years. Section 470.230, RSMo 1959. Since claimants may come forward within that period it would be advisable to preserve records as to the identity of persons entitled to these moneys and to furnish same to the State treasurer.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

LCD:dg/df

Opinion No. 296 Ans. by Letter
(McFadden)

September 8, 1964



Honorable James E. Conway
Prosecuting Attorney
Cooper County
Boonville, Missouri

Dear Mr. Conway:

By letter of August 20, 1964, you request an opinion as to whether a small island in the Missouri River should be deemed a part of Howard County or of Cooper County. The Missouri River forms the boundary between those counties at the location of the island in question. You state that the island was formerly a cape or peninsular extension of Cooper County around which the Missouri River flowed forming the boundary between the two counties.

Some time ago a man-made channel was cut across the neck of the peninsula and dikes were constructed so as to force the river through the newly made channel. The old riverbed has dried up and the island is now physically attached to Howard County.

Notwithstanding the fact that the island has been separated from Cooper county by the new channel, it is still a part of that county. In support of this conclusion, we enclose herewith a copy of an opinion rendered by this office in 1937 addressed to Senator William M. Quinn.

In pertinent part, the enclosed opinion demonstrates that the law relating to this subject is established beyond peradventure of a doubt, i.e.

"A running stream, forming the boundary line between contiguous lands, continues to be such boundary line, although the channel may change, provided the change is by the gradual erosion and cutting away of its banks and not by a sudden change leaving the old channel and forming an entirely new and different channel."
McCormack v. Miller, 239 Mo. 463.

That is to say:

"* * * if the stream changes its course suddenly and in such manner as not to destroy the integrity of the land in controversy and so that the land can be identified, it is not accretion and the boundary line remains the same as before the change of the channel."
McCormack v. Miller, supra.

Elsewhere in the opinion, the principle is stated still another way:

"It is equally well settled that where a stream which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein." (Emphasis added.)
Missouri v. Nebraska, 196 U.S. 23.

See also Randolph v. Moberly Hunting & Fishing Club, 15 SW2d 834; Nothstine v. Feldmann, 8 SW2d 912; Jacobs v. Stoner, 7 SW2d 698.

Trusting that the foregoing is sufficient to meet your requirements, I am

Very truly yours,

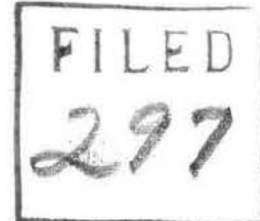
THOMAS F. EAGLETON
Attorney General

Enclosure
HLM:kd/lt

Opinion No. 297

Answered by letter

August 21, 1964



Honorable Thomas D. Graham
State Representative
235 East High
Jefferson City, Missouri

Dear Mr. Graham:

We have your opinion request which in part reads as follows:

"Foreign corporations with their principal places of business in states other than Missouri engage in the mail order health insurance business with Missouri residents by mailing an application to the prospective insureds from their respective principal places of business to Missouri residents; the applicant in Missouri returns the application to the principal place of business by mail; if the application is accepted by the soliciting company, it mails the policy to the Missouri applicant, who subsequently pays his premiums by mail to the company and all communications between the company and the insured are by mail.

"The foreign insurance companies are not licensed to do business in Missouri and they have no offices, employees, agents, bank accounts, or assets in Missouri. The companies include in each policy issued to a Missouri resident language in substantially the following form:

Honorable Thomas D. Graham

"The Company agrees (1) that this Policy shall be construed and interpreted in accordance with the laws of the State in which the Insured resides, in the same manner as if the Policy were a contract made in said State; (2) that upon request of the Insured or of the Insured's counsel it will voluntarily appear and submit itself to the jurisdiction of any court of the State of the Insured's residence having jurisdiction of the subject matter for the purpose of litigating any dispute that may arise between the Company and the Insured with respect to this Policy; and (3) that in the event of the failure of the Company so to appear and submit itself to the jurisdiction of said court, proof submitted to said court that such appearance has been requested by the Insured or by the Insured's counsel, by registered mail, return receipt requested, at least thirty days prior to the return of said action, shall be sufficient proof of notice to the Company to give said court jurisdiction of the Company for the purpose of this agreement, provided under the law of said State, the Company is permitted to make a defense."

"Does Section 375.310, RSMo 1959 apply to such companies?"

Section 375.310, RSMo 1959 provides for penalties, etc. against any corporation "transacting in this state any insurance business" unless said corporation has been authorized "so to do" by the Superintendent of Insurance.

Your question really boils down to whether, under the facts as you present them to us, such a corporation is "transacting" or "doing business" in Missouri?

The matter of "doing business" in Missouri by a foreign insurance corporation was treated in an opinion of this office (copy enclosed) dated August 22, 1961, directed to Honorable Laurence Leggett, Superintendent of the Division of Insurance. We there adopted the following language from *Selby v. Crown Life Insurance Company*, Mo. App., 189 S.W2d 135, 1.c. 136:

Honorable Thomas D. Graham

"It is the settled rule that where an insurance company, acting outside the state, accepts the application of a resident of the state which is sent directly to it without the intervention of any one of its agents, and thereupon issues a policy in accordance with the application, such policy is a policy of the state in which it is issued, and the company's issuance of it under such circumstances does not constitute the doing of business in the state in which the insured resides." (Emphasis supplied.)

The only facts disclosed in your opinion request which can be said to be in addition to those found in the Selby case are found in the special provision placed in the policies by the foreign company doing its mail order business. Such provision merely evidences three agreements between the insurer and the insured. The first agreement merely adopts the law of Missouri as it may apply to an interpretation of the contract. The second and third agreements merely obligate the insurer, at the request of insured or his counsel, to voluntarily appear and submit itself to the jurisdiction of any court of the State of the insured's residence for the purpose of suit under the policy, or for substituted service by mail in the event the insurer does not voluntarily appear to defend the action.

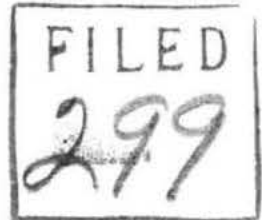
We thus construe the policy provision referred to in the preceding paragraph as being nothing more than applying the contract law of the insured's State of residence to the policy issued, and adopting a manner of securing service of process in any litigation arising under the contract which may not be as fully described in a State statute such as we find at Section 375.160, RSMo 1959.

Based upon the Selby case and the previous Attorney General's opinion (both above cited and referred to), we conclude under the facts as you pose them that such a foreign corporation is not in violation of Section 375.310, RSMo 1959.

Yours very truly,

THOMAS P. EGGLESTON
Attorney General

August 31, 1964



Honorable Daniel V. O'Brien
Prosecuting Attorney
St. Louis County
Courthouse
Clayton, Missouri 63105

Dear Mr. O'Brien:

In your letter of August 21, 1964, requesting an opinion of this office you include a letter from Richard F. Provaznik, Special City Counsel of the City of Ballwin, Missouri.

In Mr. Provaznik's letter he states that under the authority of Section 79.050, RSMo, the elective office of marshal has been abolished and a chief of police appointed.

The questions propounded are as follows:

1. Can the board of aldermen in a city of the fourth class validly pass an ordinance creating a board of police commissioners? Said board would appoint and remove the chief of police, set qualifications for police officers, select and employ police officers in numbers set by the board of aldermen, adopt rules and regulations for the police department and generally supervise and control the police department.
2. If there is no valid basis for a board of police commissioners, does

Honorable Daniel V. O'Brien

the chief of police have the sole authority and responsibility to maintain, regulate and supervise the police department?

3. Does the chief of police regulate and supervise the police department under Section 79.050, which section provides that the chief of police shall perform all of the duties of the marshal, or does the supervision lie with the mayor and/or the board of aldermen?

This office discussed this identical question in a letter sent to you on July 22, 1964. The only difference in the set of facts presented then as under discussion now was that the city in the first instance had retained its city marshal.

Section 85.610, RSMo 1959, provides that the marshal in cities of the fourth class shall be the chief of police, therefore, the titles are interchangeable.

We are enclosing a copy of the letter of July 22, 1964, which completely answers all of your questions. You have only to substitute the title, "Chief of Police" for "Marshal", as used in our previous letter. Therefore, as pointed out in the attached letter:

1. The ordinance providing for a board of police commissioners would be invalid;
2. The chief of police would supervise and regulate the police department; and
3. Section 85.620 provides that police officers "may be appointed in such numbers, for such times and in such manner" as may be prescribed by ordinance, but there is no direct statement in the statutes as to who may supervise the chief of police.

Honorable Daniel V. O'Brien

As stated in our previous letter of July 22, 1964, it was the apparent intention of the Legislature to make the chief of police the chief law enforcement officer of the city.

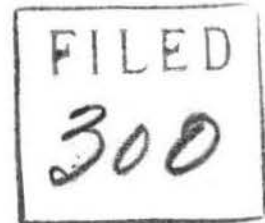
Yours very truly,

THOMAS F. EAGLETON
Attorney General

OHS/fh

Enclosure *Sp. Inv. # 205, 7-22-64, O'Brien*

August 28, 1964



Mr. Charles E. Cates
Member, Industrial Commission
State Office Building
Jefferson City, Missouri

Dear Mr. Cates:

You have directed an inquiry to this office in which the substance of inquiry may, I believe, be stated as follows:

- (1) Does the Industrial Commission have authority to commute awards made by the Commission against the Second Injury Fund.
- (2) Does the Industrial Commission have authority to authorize lump sum settlements of attorney's fees from the Second Injury Fund.
- (3) Can payments be made from the Second Injury Fund after the death of an injured employee.

Commutation of awards are dealt with in Section 287.530. This section provides in part as follows:

"1. The compensation provided in this chapter may be commuted by said commission and redeemed by the payment in whole or in part, by the employer, of a lump sum which shall be fixed by the commission * * *".

Mr. Charles E. Cates

It will be noticed that in this section there is only a reference to commutation as between the employee and the employer. There is no reference to commutation with respect to compensation claims payable out of the Second Injury Fund. We regard this language as significant. In the absence of authority to commute an award against the Second Injury Fund, it is our opinion that such authority does not exist.

With reference to the second question, authority for lump sum payment of attorney's fees is included in Section 287.260, RSMo 1959. This section exempts compensation from attachment, garnishment, and execution and then contains the following language:

"* * * save that if written notice is given to the commission of the nature and extent thereof, the commission may allow as lien on the compensation, reasonable attorney's fees for services in connection with the proceedings for compensation if such services are found to be necessary and may order the amount thereof paid to the attorney in a lump sum or in installments. * * *"

This section appears to be dealing solely with the matter of compensation as between the employee and the employer and does not either directly or by inference refer to claims against the Second Injury Fund. We, therefore, conclude that the language which authorizes the Commission to order the amount of attorney's fees to be paid in a lump sum does not authorize the payment of attorney's fees in a lump sum from the Second Injury Fund. This is particularly true in the light of the consideration herein-after discussed in answer to the third question.

The third question relates to the liability of the Second Injury Fund after the death of the injured employee. Section 287.220, RSMo 1959, clearly contemplates that the compensation payable out of the Second Injury Fund is to be paid only after completion of the payment of compensation by the employer for

Mr. Charles E. Cates

either permanent partial or permanent total disability. With respect to the liability of the employer after the death of the employee, Section 287.230, RSMo 1959, provides for two situations, the first, where death results from the injury and the second, where death results from some other cause. In the first situation, death is deemed the termination of disability, no doubt because the employer--and the employer alone--would be liable to any dependents for the death benefit less the amount of compensation theretofore paid. It would follow in this situation that the dependents would have no claim against the Second Injury Fund. In the second situation (death from unrelated causes) payments of the unpaid, unaccrued balance of compensation ceases and all liability therefor terminates unless there be surviving dependents at the time of such death. Although this statute has been construed (without discussion of the basis for determining this precise point) to mean that the right to the compensation and to make claim therefor survives to the dependents, we believe that absent a specific legislative declaration that surviving dependents are entitled to unpaid and unaccrued compensation payable out of the Second Injury Fund, the rights of the dependents are limited to the compensation payable by the employer. It would appear to us that different considerations are applicable and that unless the legislature specifically declared otherwise, the surviving dependents in this situation should not receive payments out of the Second Injury Fund. The foregoing would seem to strengthen our view that compensation payments under the Second Injury Fund may not be commuted nor should attorney's fees be paid in a lump sum therefrom.

I hope this adequately explains our views regarding this problem. If you have any other questions, we will attempt to answer them.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JGS:cs:lo

TAXATION:
ROADS AND BRIDGES:
SECOND CLASS COUNTY:
COUNTY BUDGET LAW:

Where second class county has levied a tax under Section 137.555, RSMo 1959, for the purpose of creating a Special Road and Bridge Fund and budget adopted for fund under Sections 50.025 to 50.660, RSMo, and funds received from tax are in excess of amount budgeted, the budgeted amount for this fund cannot be changed or amended.

*copies in
vault*

OPINION NO. 302

November 27, 1964



Honorable Gerald Kiser
Prosecuting Attorney
Clay County
Liberty, Missouri 64068

Dear Mr. Kiser:

In your letter of August 26, supplemented by your letter of September 17, 1964, you state the following: Clay County is a county of the second class and the 1964 budget established for the road and bridge fund is less than the actual revenue received from the special tax levy. In other words, the income from the special tax levy for roads and bridges is in excess of the amount anticipated. You further state that you have exhausted the funds in the special tax fund, as it was budgeted, and now have need of funds for expenditures on roads and bridges.

Your question is, "Can you use the special tax funds received for road and bridge purposes in excess of the amount budgeted?"

Pursuant to Section 50.540 and Section 50.550, RSMo 1959, your budget for 1964 was adopted for the Special Road and Bridge Fund. Under Section 137.555, RSMo, the county court had levied a tax for road and bridge use. The statute provides, in part:

Honorable Gerald Kiser

"In addition to other levies authorized by law, the county court in counties not adopting an alternative form of government and the proper administrative body in counties adopting an alternative form of government, in their discretion may levy an additional tax, not exceeding thirty-five cents on each one hundred dollars assessed valuation, all of such tax to be collected and turned into the county treasury, where it shall be known and designated as 'The Special Road and Bridge Fund' to be used for road and bridge purposes and for no other purpose whatever; * * *"

The money on hand from the special tax can only be used for one purpose. Section 137.555, quoted above, specifically states that the Special Road and Bridge Fund is, "to be used for road and bridge purposes and for no other purpose whatever." (Emphasis supplied.)

The county budget law for class two counties is contained in Sections 50.525 to 50.660, RSMo, as amended. These sections provide that on or before December 1st the budget officer receives estimates of expenses and revenues from the various departments. The budget officer then prepares a budget document which he submits to the county court. Prior to the submission of this document the budget officer must hold public hearings and budget information must be open to public inspection at all times.

The budget plan must contain a complete financial plan for the ensuing year. Receipts from the special tax levy for roads and bridges must be kept in a special fund and all expenditures for roads and bridges must be charged to that fund (Section 50.550).

After the budget document is submitted to the county court, copies are made available for public distribution and the court must hold at least one public hearing on the budget after due notice to the public. The court may revise the document before final approval.

Honorable Gerald Kiser

There is no statutory authority for the revision of the budget once it has been adopted.

The legislature has provided a precise method for establishment of the budget. At least two public hearings are provided for and the entire budget document is made available for public perusal.

To permit the budget to be amended or changed in any manner after it has once been established would be to defeat the very purpose of the elaborate system provided by the legislature for public scrutiny. It was the obvious intent of the legislature to require the county court to make a full disclosure of the anticipated revenue and expenditures and to give the public ample opportunity to question or protest.

Our Supreme Court has held:

"This court has held that the purpose of the County Budget Law was 'to compel * * * county courts to comply with the constitutional provision, section 12, art. 10' by providing 'ways and means for a county to record the obligations incurred and thereby enable it to keep the expenditures within the income.' Traub v. Buchanan County, 341 Mo. 727, 108 S.W. 2d 340, 342." [Gill v. Buchanan County, 142 S.W. 2d 665, 668.]

The very fact that the legislature did not provide for amending or altering the budget, once it was established, demonstrates their intention that it should not be amended. The courts of this state have held that where a statute prescribes a method of procedure it cannot be done otherwise. Keane v. Strodtman, 18 S.W. 2d 896, 898.

"* * * The familiar maxim of 'expressio unius est exclusio alterius' may also be invoked, for the maxim is never more applicable than in the construction of statutes. Whitehead v. Cape Henry

Honorable Gerald Kiser

Syndicate, 105 Va. 463, 54 S.W. 306;
Hackett v. Amsden, 56 Vt. 201, 206;
Matter of Attorney General, 2 N.M. 49.

"[5] Certainly where, as at bar, the statute (section 8702) limits the doing of a particular thing to a prescribed manner, it necessarily includes in the power granted the negative that it cannot be otherwise done. This is the general rule as to the application of the maxim. Even more relevant under the facts in this case is the interpretation given to it by the Kansas City Court of Appeals in Dougherty v. Excelsior Springs, 110 Mo. App. 623, 626, 85 S.W. 112, 113, to this effect: 'That when special powers are conferred, or where a special method is prescribed for the exercise and execution of a power,' that exercise is 'within the provision of the maxim * * * and * * * forbids and renders nugatory the doing of the thing specified except in the particular way pointed out.'"

As we have stated, there is nothing in the county budget law indicating any legislative intent to permit the expenditure of any fund for roads and bridges in excess of the amount budgeted.

If the income received from the special tax levied for roads and bridges is greater than the amount anticipated, it is required by law to be placed in the Special Road and Bridge Fund, and it must be used only for the purpose for which it was designated.

CONCLUSION

It is the opinion of this office that where a county of the second class has levied a tax under Section 137.555, RSMo 1959, for the purpose of creating a Special Road and

Honorable Gerald Kiser

Bridge Fund and a budget was adopted for this fund under Sections 50.025 to 50.660, RSMo, and funds received from this tax are in excess of the amount budgeted, the budgeted amount for this fund cannot be changed or amended. The amount expended for road and bridge purposes must be limited to the amount budgeted for this purpose.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

LICENSING:
MOTOR VEHICLE:
MOTOR VEHICLE LICENSES:
TRAILER:

A dolly used to tow disabled automobiles to and from a salvage yard is not a trailer as defined in Section 301.010 (27) (28) and is not required to be registered and licensed by the state.

Opinion No. 303

November 6, 1964



Honorable William J. Esely
Prosecuting Attorney
Harrison County
Bethany, Missouri

Dear Mr. Esely:

This is in answer to your request for an opinion of this office as to whether dollies used to tow disabled cars to and from a salvage yard should be registered with and licensed by the state.

Section 301.020, RSMo 1959 provides that every owner of a motor vehicle or trailer which shall be operated or driven upon the highways of this state shall file with the office of the Director of the Department of Revenue an application for registration. A license is then issued upon payment of the proper fee.

The term "trailer" is defined for the purpose of registration requirements in subparagraph 27 of Section 301.010 as follows:

"(27) 'Trailer', any vehicle without motive power designed for carrying property or passengers on its own structure and for being drawn by self-propelled vehicle, * * * "

A "vehicle" as defined in subparagraph 28:

"(28) 'Vehicle', any mechanical device on wheels, designed primarily for use on highways, * * * "

The question thus presented is whether a dolly used for the purpose indicated is a "trailer" within the meaning of the definitions given above.

November 6, 1964

The dollies in question are used for towing disabled automobiles and only when all four wheels of the disabled automobile are inoperative. One end of the car is suspended by a tow truck and the other is put on a dolly. A typical dolly of this type is carried unassembled on the back of the tow truck. It consists of two sets of two wheels each of which may be attached to two iron pipes which serve as axles. Two iron "buckets" are cradled on the pipes. The two wheels of a car being towed are set on these buckets and the dolly does serve as auxiliary wheels.

It is true that at first glance a dolly appears to be within the broad statutory definition of a trailer. It is a vehicle as defined in Section 301.010 (28) as it is a mechanical device on wheels and is designed primarily for use on the highways. These dollies are without motive power and are designed for carrying property on their own structures and for being drawn by a self-propelled vehicle.

However, it is the opinion of this office that a dolly is not a trailer which must be registered and licensed by the state. Statutes should be given a reasonable interpretation to carry out the legislative intent. Even though the definition of a trailer is quite broad it could be construed to include a dolly only by the broadest construction of each phrase of the definition, both of a trailer and a vehicle. Most persons have a fairly clear understanding of what a trailer is. No man looking at a tow truck dolly would ever consider it to be a trailer. We believe that the Legislature did not intend that such dollies were to be termed "trailers" even though the definition adopted by the Legislature technically might be considered broad enough to include them. It should be noted that the Department of Revenue has never taken the position that a dolly is a trailer and must be licensed as such.

As a practical matter, a dolly is only a tool or mechanical aid used by a tow truck (which must be licensed) to enable it to perform its function when three or four wheels of a disabled automobile are inoperative. A tow truck dolly functions only as an extra set of wheels joined by an axle to take the place of a damaged wheel of an automobile. If the tow truck carried two extra wheels which could be attached separately to the wheels of a disabled automobile to enable it to be towed, these extra wheels would not be considered a vehicle or trailer. The fact that these extra wheels are joined by an axle does not change their essential mechanical function.

It is our view that the term "trailer" as used in Section 301.010 (27) should be given an interpretation which is in harmony with the common understanding and experience of man and

November 6, 1964


not a mere technical interpretation solely on the ground that the definition of a "trailer" could be considered broad enough to include tow truck dollies. Certainly, under common usage, the accepted meaning of a trailer would not include a dolly used in the manner indicated.

CONCLUSION

It is, therefore, the opinion of this office that a dolly used to tow disabled automobiles to and from a salvage yard is not a trailer as defined in Section 301.010 (27) (28) and is not required to be registered with and licensed by the state.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

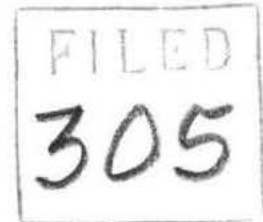

THOMAS F. EAGLETON
Attorney General

FAIRS:
COUNTY FAIRS:
CITIES, TOWNS, AND VILLAGES:
TAXATION:
PARKS:
CONSTITUTIONAL LAW:

A county which presently levies the maximum property tax authorized by the Constitution may not levy an additional tax to secure funds for a county fair under authority of Section 64.755, RSMo Cum. Supp., so long as a city within the county levies a tax on property within the city for park purposes, one of those purposes set out in Section 64.755. Nor may a county submit a proposed tax to the public in anticipation of legislative action authorizing the proposed tax.

November 30, 1964

Opinion No. 305



Honorable John T. Russell
State Representative
Laclede County
Box 93
Lebanon, Missouri

Dear Mr. Russell:

This is in answer to your recent request for an opinion of this office relating to a proposed tax levy to secure funds to be used for a county fair.

Your first question reads as follows:

"Are there any statutes which would allow the question of an additional tax levy for the purposes of capital improvements to be used as agricultural and fair exhibits? It has been suggested perhaps a section pertaining to recreation could be used for this purpose. The city of Lebanon located in Laclede County now levies a 2 mil tax for park purposes."

Section 262.500, RSMo 1959, provides that in all counties of this state in which the constitutional limit is not levied for county purposes, the county court, with the approval of the voters, may levy a two mill tax for the promotion of county fairs as described therein. One half of this tax must be used for premiums at such fairs and only the other half can be used for the purpose of purchasing grounds and constructing buildings for a county fair. Laclede County has a twenty million dollar assessed valuation and the county therefore may levy a maximum of fifty cents for county purposes. You state in your letter that the county levy of Laclede County is now fifty cents, therefore, no further levy can be made under Section 262.500.

The statute pertaining to recreation to which you refer is Section 64.755, RSMo Cum. Supp. 1963, which reads as follows:

"1. The governing body of any political subdivision may provide, establish, equip, develop, operate, maintain and conduct a system of public recreation, including parks and other recreational grounds, playgrounds, recreational centers, swimming pools, and any and all other recreational areas, facilities and activities, and may do so by purchase, gift, lease, condemnation, exchange or otherwise, and may employ necessary personnel. Funds to be spent for such purposes may be set up in their respective budgets by any governing body.

"2. If sufficient funds cannot be made available from ordinary levies, additional funds may be raised by a special tax levy, or bond issue within constitutional limits, but no special tax shall be levied or any bonds issued by any political subdivision unless the rate and purpose of the tax or bond issue is submitted to a vote and a two-thirds majority of the qualified voters voting thereon vote therefor. The rate of such special tax levied by one or more political subdivisions or by cooperating political subdivisions shall not total in the aggregate more than two mills on each one dollar assessed valuation of all real and tangible personal property subject to its or their taxing powers. In the event that any political subdivision is now authorized by statute to levy a tax for this purpose, the combined levies authorized by such statute and by this section shall not exceed the larger levy authorized." (Emphasis added)

This section provides for a tax levy for public recreation, including parks and other recreational grounds, playgrounds, recreational centers, swimming pools, and all other recreational areas, facilities and activities. There appears to be a "close" question as to whether capital improvements to be used as agricultural and fair exhibits would be included within the term "recreation" as used in the above statute. However, we do not feel it necessary to decide this inasmuch as if we assume that capital improvements for agricultural and fair exhibits are embraced by the term "recreation", it is our opinion that at this time, Laclede County may not make an additional levy under this statute for other reasons.

The term "this purpose" as used in the emphasized portion of Section 64.755, RSMo Cum. Supp. 1963, means any of those purposes set out in subparagraph 1, namely, to "provide, establish, equip,

develop, operate, maintain, and conduct a system of public recreation, including parks and other recreational grounds, playgrounds, recreational centers, swimming pools, and any and all recreational areas, facilities and activities * * *." This was our holding in Opinion No. 102 of this office rendered on June 29, 1962, to the Honorable Chester W. Hughes, Representative, Johnson County, a copy of which is enclosed.

Thus, this last sentence means that if any political subdivision is now authorized by another statute to levy a tax for any purpose set out in Section 64.755, the combined levies authorized by such other statute and by Section 64.755 shall not exceed the larger levy authorized. Inasmuch as Lebanon, a political subdivision, Section 64.750 (3), RSMo 1963 Cum. Supp., now levies a tax of two mills for park purposes, one of the purposes set out in Section 64.755, and this is the maximum allowed by either Sections 90.500 or 94.070 (3) which authorize this levy, it follows that the county could not levy a two mill tax under Section 64.755 which could be assessed against property subject to the Lebanon tax.

Section 3 of Article X, Constitution of Missouri, 1945, provides that taxes must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax. Thus, since a county levy must apply equally to all property within the county, Laclede County could not constitutionally make a valid levy under Section 64.755 which would operate only upon property located outside the City of Lebanon. Since a tax under Section 64.755 may not be levied on property in the town of Lebanon and the rule of uniformity requires that a county property tax must apply to all property within the county, it is evident that so long as Lebanon retains its present park levy, the county may not enact a tax levy under Section 64.755.

The second question raised by your letter is as follows:

"Is it possible that this matter of the fair tax be submitted to the people at the November Election under Section 262.500, RSMo., in anticipation of legislation which would provide that such tax in excess of the constitutional limit, if approved by the people, could be used for fair purposes only. It is understood that the county levy is now fifty cents, which is the maximum."

The power to levy and collect property taxes is purely statutory and taxes can be levied only by the tribunal to which

such power is granted by the Legislature. *Keane v. Stródtman*, 18 SW2d 896; *State v. Young*, 38 SW2d 1021. In answer to your first question, we found no existing statutes authorizing Laclede County under its present circumstances to levy a tax to raise funds to be used for county fair purposes. In absence of such a statute the county is not authorized to submit a proposed tax to a vote anticipating legislation authorizing the tax.

It is our understanding from this question that you intend to amend Section 262.500 so as to provide that the county may levy the tax authorized therein even though it would be in excess of the constitutional limit. Under this section as now written, the authority for such a tax is a permanent one. The only authorization for making a permanent tax in excess of the constitutional limit is under the provisions of Article X, Section 11(c) of the Constitution which provides that the Legislature may enact laws authorizing a tax in excess of the constitutional limit for "library, hospital, public health, recreation grounds, and museum purposes." The only basis upon which this tax could be held to be a permanent one in excess of the constitutional limit under this section of the Constitution would be that it is one for "recreational grounds". It is not our policy to give an opinion as to the constitutionality of proposed legislation except in exceptional cases. However, we do feel there is some question as to whether any or all of the uses for the tax provided in Section 266.500 would be included in the term "recreational grounds".

In view of our answer to your first two questions, it is not necessary to answer your third question regarding the form in which the question should be presented to the people.

CONCLUSION

A county may not levy an additional tax to secure funds for construction of buildings to be used for a county fair under authority of Section 64.755, RSMo Cum. Supp. 1963, so long as a city within such county levies a tax of two mills on the dollar on property within the city for park purposes, one of those purposes set out in Section 64.755.


Nor may a county submit a proposed tax for payment of premiums at public fairs in such county and purchasing grounds and erecting buildings for fair purposes to the public in anticipation of legislative action removing the constitutional limitation upon the tax authorized by Section 266.500, RSMo 1959.

Honorable John T. Russell

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The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

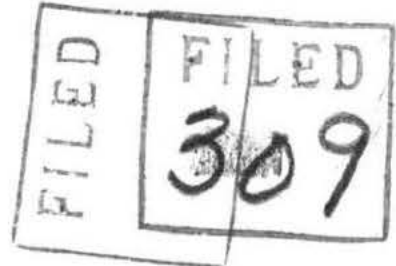
Very truly yours,


THOMAS F. EAGLETON
Attorney General

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10/1/74

Opinion No. 309
Answered by letter

September 14, 1964



Major General A. D. Sheppard
Adjutant General of Missouri
Adjutant General's Office
Jefferson City, Missouri

Dear General Sheppard:

We are in receipt of your request of September 2, 1964,
for an official opinion of this office.

We are informed that you, as Adjutant General of this State desire to arrange participation in National Guard Association of the United States Group Health Insurance, a group health insurance program for employees of the National Guard of this State, most of whom are paid from Federally appropriated funds, that employee participation will be voluntary, that contributions will be solely by the employee and no State funds will be contributed, that contributions will be deducted by the United States Department of Defense and that you desire to enter into an agreement with the Secretary of Defense for this purpose.

Under Chapter 41, RSMo 1959, the Adjutant General is the administrative head of the military establishment of this State, under the direction of the Governor. It is the opinion of this office that the Adjutant General of this State, under the direction of the Governor, may arrange participation of National Guard employees in the National Guard Association of the United States Group Health Insurance and enter into the above mentioned agreement with the Secretary of Defense to provide for the payment of contributions of Federally paid employees by withholding sums from their compensation.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

LCD/dg

DOCTORS:
PRACTICE OF MEDICINE:
MEDICINE:
HEALING ARTS:
BOARD OF HEALING ARTS:
CHIROPODISTS:
PODIATRISTS:

Chiropodists prohibited from
treating systemic diseases
including "nerves" even though
such diseases affect patient's
foot.

Opinion No. 312

September 18, 1964

Mr. John A. Hailey
Executive Secretary
State Board of Registration
for the Healing Arts
P. O. Box 4
Jefferson City, Missouri



Dear Mr. Hailey:

This is in response to your recent request for an opinion
of this office which request reads as follows:

"I have been requested by the State Board
of Registration for the Healing Arts to
request an opinion of your office on the
following set of facts:

"It has come to the attention of the Board
that a duly licensed Missouri podiatrist
has treated a patient by the prescription of
internal medicine to correct a rash on the
bottom of the patient's foot. The diagnosis
of the podiatrist as communicated to the
patient was that the patient was suffering
from 'nerves' and that the rash on the patient's
foot was a symptom of this condition.
Accordingly, the podiatrist wrote two prescrip-
tions, one for Ataraxoid, one for Temaril.
These are potent drugs which are taken
orally. They are tranquilizers and must be
used cautiously. Both of the drugs prescribed
are 'legend' drugs; that is, they may be
obtained only on prescription.

Mr. John A. Hailey

"As you know, the State Board of Registration for the Healing Arts is charged not only with regulating the professions it licenses but also with halting the unauthorized practice of the healing arts. Section 334.230, RSMo 1959. Since podiatrists enjoy certain privileges relating to the prescription of drugs under the provisions of Section 330.010, RSMo Cum. Supp. 1963, the Board requests your opinion as to whether the podiatrist in question is exceeding the privileges granted to him by that or by any other statutory section and therefore unlawfully invading the practice of the healing arts."

The statute applicable to your inquiry is Section 330.010, RSMo Cum. Supp. 1963, which reads in part:

"The definitions of the words 'chiropody' and 'podiatry' shall be synonymous and interchangeable and, for the purpose of this chapter, be held to be the local, medical, mechanical or surgical treatments of the ailments of the human foot, and massage in connection therewith. It shall not include amputation of the foot and toes or the use of anesthetics other than local. The use of drugs or medicines shall be limited to the prescription or administration of nonnarcotic analgesics, antipyretics, sedatives, fungicides and antibacterials only when specifically indicated for the treatment of ailments of the human foot. The use of such drugs and medicines in the treatment of ailments of the human foot shall not include the treatment of any systemic diseases. Wherever 'chiropody' is used in this chapter it shall be construed to mean either chiropody or podiatry."

Mr. John A. Hailey

Although the foregoing statute has never been interpreted by an appellate court, we believe its import is clear as to the circumstances under which a chiroprapist may prescribe and administer drugs:

1. When "specifically indicated for the treatment of ailments of the human foot," nonnarcotic analgesics, antipyretics, sedatives, fungicides and antibacterials may be prescribed by chiroprapists;

2. Chiroprapists may not prescribe or use such drugs in the treatment of systemic diseases.

According to your letter, both of the drugs prescribed in the instant case are tranquilizers. Although tranquilizers are not specifically authorized for use by chiroprapists in the above quoted section, we will assume, for purposes of this opinion only, that tranquilizers are included within the term "sedatives" as used in that section.

Therefore, the determinative issue herein is whether the chiroprapist exceeded the privileges granted to him by his license in attempting to treat a "systemic" disease with otherwise permissible drugs. His diagnosis of the patient's problem was "nerves" which we take to mean that, in his opinion, the patient was in a state of excessive emotional agitation and was unduly excitable. Indeed, this interpretation is certainly consistent with the chiroprapist's prescription of tranquilizing drugs.

Having made his diagnosis of the patient's basic problem, the chiroprapist proceeded to treat the rash on the patient's foot by relieving the anxiety which gave rise to the physical condition complained of. Under these circumstances, it is necessary to determine whether the condition referred to as "nerves" is a systemic disease, and therefore beyond the legitimate scope of the chiroprapist's professional powers.

"Systemic" is defined by Webster's Third New International Dictionary, 1963, as "of, relating to, or common to a system: as a: affecting the body generally--distinguished from local" In view of this definition, we believe that there can be no argument that the condition commonly referred to as "nerves" is a systemic disease in that it affects the entire being, rather than a part thereof.

Mr. John A. Hailey

We do not regard as significant the fact that this case of "nerves" may have manifested itself by a rash on the patient's foot. If the location of the symptom were determinative of a chiropodist's authority to treat a disease, chiropodists would be authorized to treat diabetes, polio, or any other disease which produced a disability of the foot.

It has been clearly established in the case of State ex rel. Gibson v. Missouri Board of Chiropractic Examiners, (Mo. App., 1963) 365 SW2d 773, 779, that when a chiropractor, in his treatment of a patient, goes beyond the type of treatment authorized by his license, he enters into the unauthorized practice of medicine. We think that the same would be true with regard to a chiropodist who undertakes to treat a systemic disease. Therefore, the activities of the chiropodist in question here are a matter of legitimate concern to the State Board of Registration for the Healing Arts in its fulfillment of the duties imposed on it by Sections 334.230 and 334.240, RSMo 1959.

In the Gibson case, supra, the revocation of a chiropractor's license was affirmed by the Kansas City Court of Appeals where the chiropractor had exceeded the privileges as to authorized treatment granted by his license. Accordingly, we would suggest that you advise the State Board of Chiropody of all details of this matter so that that Board may consider appropriate corrective action.

CONCLUSION

Therefore, it is the opinion of this office that the condition commonly referred to as "nerves" is a systemic disease and therefore beyond the authorized area of treatment by chiropodists even though such "nerves" may cause a rash on a patient's foot.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Albert J. Stephan, Jr.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

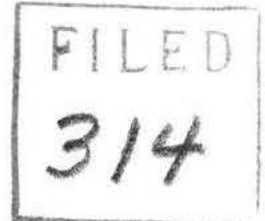
INCOME TAX:
INCOME TAX RETURNS:
CONFIDENTIAL INFORMATION:

No person other than a grand jury, prosecutor or Attorney General may obtain information from the Director of Revenue concerning income tax returns, including disclosure of whether or not a return has been filed.

Opinion No. 314

October 5, 1964

Honorable M. E. Morris
Director, Department of Revenue
Jefferson Building
Jefferson City, Missouri



Dear Mr. Morris:

This opinion is in response to your request for an official opinion of this office inquiring "if it is legal and proper for our Income Tax Division to answer inquiries as to whether an individual citizen of Missouri has or has not filed an income tax return?"

We enclose herewith a copy of the opinion of this office addressed to Forrest Smith dated July 20, 1939, holding that state income tax returns must be produced under a subpoena duces tecum to a grand jury.

Under the reasoning of that opinion, to which we adhere, a prosecuting attorney and the Attorney General may obtain information relative to state income tax returns from the Department of Revenue and may also obtain from the Department information as to whether or not a given individual or corporation has filed a return. This stems from the legislative purpose of enforcing the income tax laws, both criminal and civil. The enclosed opinion presents a full exposition of this purpose and leads directly to the result that information regarding income tax returns and the returns themselves are available to prosecutors and the Attorney General.

Note the proviso in Section 143.270 RSMo, Subsection 2:

(Repealed)

"* * * provided, however, that this section shall not prohibit the director of revenue nor any agent, clerk or inspector from proceeding in the discharge of their official duties in the administration of the income tax laws, nor from giving evidence in any court, or before

the state tax commission, in any proceeding brought to collect any tax due hereunder or to question or determine the validity or correctness of any assessment by the director of revenue under the terms of this chapter, or to punish any person for making false or fraudulent returns; * * *."

We think that the prosecution of those who make false and fraudulent tax returns comes within the term "administration of the income tax laws" as used in the above proviso and tax officials are permitted to divulge such information to the legally constituted law enforcing agencies of the state when an individual's return is under investigation. If these returns are withheld from a grand jury or other agencies of the state in the enforcement of the criminal or civil tax laws, we are at a loss to see how anyone could be successfully prosecuted for rendering a false, fraudulent, or insufficient return unless the law enforcing officers are permitted to examine the return of the individual.

However, we hold that no persons or officers may divulge any information relative to the contents of any state income tax return or information as to whether or not a return has been filed to any person or persons other than to a grand jury, a prosecuting attorney, and the Attorney General.

Section 143.270, RSMo, Subsection 1, provides:

"1. It shall be unlawful for any person, persons or officers to divulge, give out or impart to any other person, or persons, any information relative to, or the contents of any income tax return filed under this chapter, * * *." (Emphasis supplied)

The prohibition in the statute is not confined to information about the contents of any income tax return, but includes "any information relative to" an income tax return filed in Missouri. The use of this phrase separated from the reference to disclosure of contents of returns must mean something other than disclosure of contents of returns. The reasonable meaning, therefore, of the phrase "any information relative to" is that the fact of filing or not is "relative" to a return and, hence, the statute means that the fact of filing or not filing must not be disclosed except to authorized officials.

To inform an inquirer that a return has been filed would be giving information relative to that return. In order to conform to the statute and decline to advise anyone that a given return has been filed, it is also necessary to withhold information that a return was not filed for a certain year by a named person.

If the Department were at liberty to divulge that a person had not filed a return for a certain year, an inquirer would be able to ascertain that another certain return had been filed. Consider the operation of such a system. If a certain return had not been filed, the Department would answer that it had not. If a return had been filed, the Department would refuse to give that information. Thus, if an inquiry elicited from the Department a refusal to answer, then the inquirer would know that the return had been filed, and this would be a violation of the statute.

The public policy of Missouri in this regard is to be contrasted with that of the federal government. 26 U.S.C.A. 6103 provides that income tax returns are public records that shall be open to inspection upon the order of the President or under regulations approved by the President, and that lists of taxpayers are to be made available to the public. Missouri has no comparable statute.

The policy expressed in the Missouri statute (Section 143.270) is directly to the contrary and provides for secrecy, only allowing disclosure to investigating and prosecuting agents of the state.

CONCLUSION

It is the opinion of this office that:

- (1) State income tax returns must be produced under a subpoena duces tecum to a grand jury;
- (2) A prosecuting attorney or the Attorney General can require the Department of Revenue to furnish to such prosecutor or Attorney General the contents of any income tax return and information as to whether or not an income tax return has been filed;
- (3) No person or persons other than a grand jury, a prosecutor, or the Attorney General can receive from any person or officers any information relative to any income tax return, including whether or not a return has been filed.

The foregoing opinion, which I hereby approve was prepared by my Assistant, Donald L. Randolph.

Yours very truly,

Thomas F. Eagleton
THOMAS F. EAGLETON
Attorney General

INSURANCE: Articles of Incorporation of the Life and Health
Insurance Company of St. Louis.

Opinion No. 315

September 30, 1964



Honorable Ralph H. Duggins
Superintendent, Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

This letter is in response to your letter of September 14, 1964, wherein you request this office to examine the Declaration of Intention, and Articles of Incorporation of the Life and Health Insurance Company of St. Louis. We also received proof of publication of these documents.

An examination of these documents has been made as required by Section 376.070, RSMo 1959, and except for Article VII, they follow forms previously approved by this office. As to Article VII we are not aware of any statutory prohibition against such provisions. However, the article would appear to allow the assets of the company to be diminished by permitting the sale of stock at a nominal price.

Article VII permits the board of directors to grant to agents, brokers, employees, directors and original stock subscribers options to purchase stock in the corporation treasury at a price determined by the directors.

We note that provision is made requiring the option plan to be approved by the Superintendent of Insurance and further that this requirement shall not be eliminated by amendment. However it would seem that such "non-elimination clause" could be amended out of the Articles of Incorporation and likewise the requirement that stock option plans be approved by the Superintendent of Insurance.

Honorable Ralph H. Duggins

-2-

In sum, it is the opinion of this office that the Declaration and the Articles of Incorporation of the Life and Health Insurance Company of St. Louis are not inconsistent with the provisions of Sections 376.010 to 376.670, RSMo 1959, and the constitution and laws of this State and the United States. However, we take occasion to call to your attention certain ill effects which may flow from the provisions of Article VII.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Louis C. DeFeo, Jr.

THOMAS F. EAGLETON
Attorney General

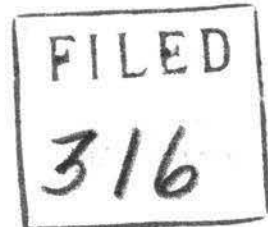
LCD/dg

BOARD OF PHARMACY:
ZONING:
ADMINISTRATIVE LAW:

Restrictions imposed by city ordinance provide no basis for the Missouri Board of Pharmacy to refuse to license a pharmacy which is otherwise qualified for license.

Opinion No. 316

September 16, 1964



Mr. Lloyd W. Tracy, Secretary
Missouri State Board of Pharmacy
Room 130, State Capitol Building
Jefferson City, Missouri

Dear Mr. Tracy:

Several weeks ago, in your official capacity as Secretary of the Board of Pharmacy, you requested and received from this office advice concerning an application for a pharmacy license which was pending before the Board. Since that time, this office has received a request for an official opinion on the same subject matter which will be answered by means of this opinion directed to you.

As we understand the facts of the case, they are: The applicant for a pharmacy license is a duly registered pharmacist who owns an office building in the City of Columbia. The building is occupied, or will be shortly, mainly by physicians; and the pharmacist proposes to operate a pharmacy in the building. The pharmacy has been furnished and equipped in accordance with all applicable statutes and regulations and would qualify for licensure in all respects, unless a zoning ordinance of the City of Columbia could be regarded as disqualifying the premises from being licensed.

The zoning ordinance restricts the operation of pharmacies in the area in question to those which are "accessory" to hospitals, sanitariums, or clinics where the pharmacy is "incident and subordinate to the main use, and is an integral part of the main building; is operated only during the hours of the main building, and in no case before the hour of seven o'clock in the morning, nor after the hour of six o'clock in the evening, and further provided that no retail sales are made or completed therein other than the sale of drugs and medicines prescribed by a physician or surgeon, or that is listed in the latest edition of The United States Pharmacopeia (sic)."

Mr. Lloyd W. Tracy

The arguments advanced against the issuance of the license under these circumstances are:

(a) that the ordinance would so inhibit the function of a pharmacy that the pharmacy could not be operated in accordance with state law;

(b) that the pharmacy may be operated only by the owner of the hospital, sanitarium, or clinic;

(c) that the ordinance purports to limit any pharmacy within the area to the dispensing of drugs that are either prescribed by a "physician or surgeon" or those which are listed in the United States Pharmacopoeia. With regard to the former restriction, it has been noted that, in addition to physicians and surgeons, prescriptions may also be written by dentists, veterinarians, and chiropractors. With regard to the latter restriction, it has been noted that a licensed pharmacy in this state must be so equipped that "United States Pharmacopoeia and National Formulary preparations (may be) properly compounded" Section 338.250, RSMo 1959 (Emphasis and parenthetical matter supplied.)

We have carefully examined all of the foregoing arguments which have been advanced as reasons for the Board's refusal to issue the license in question. We fail to find merit in these arguments whether they are viewed individually or collectively and have concluded that the Board has no choice but to issue the license, if the applicant meets all other requirements.

The City of Columbia operates under a constitutional charter. Since the charter itself must be "consistent with and subject to the constitution and laws of the state," Mo. Const., 1945, Art. 6, § 19, it follows that the ordinances enacted by the city must also be consistent with the statutes of this state at peril of their invalidity. See *Turner v. Kansas City*, (Mo. Sup., 1945) 191 SW2d 612, 615, and *State ex rel. Collins v. Keirnan*, (Mo. App., 1947) 207 SW2d 49, 53, where the Kansas City Court of Appeals, quoting approvingly from *Corpus Juris*, said, "A municipal corporation can have no other source than a sovereign power, its creation is an attribute of sovereignty. It is a political creature, and the creature cannot be greater than its creator."

Mr. Lloyd W. Tracy

Therefore, if there be a conflict between the ordinance and the statutes of this state which regulate the operation of pharmacies, then the ordinance, at least to the extent of the conflict, is invalid. Undoubtedly, the ordinance places stringent restrictions upon the operation of the pharmacy in question. However, we do not believe that the resolution of this problem by this office or by the Board requires a determination as to the validity of the ordinance.

Assuming without deciding that the ordinance is valid, it is clear that a pharmacy operating within the limitations and restrictions set out by the ordinance would still require a license as contemplated by Sections 338.210 through 338.310, RSMo 1959. That is to say, even if all of the arguments against the issuance of the license, which are set out above as paragraph (c), were conceded, the license would be necessary even for the pharmacy to operate within the restrictions. Hence, even if the pharmacy, in accordance with the ordinance, dispensed only drugs on prescription, it could not operate lawfully unless it had a pharmacy license issued by the Board. Regardless of whether the pharmacy fills prescriptions of dentists and veterinarians, it is beyond dispute that a license is necessary in order to compound prescriptions of physicians and surgeons. The ordinance in no way prevents a pharmacy from being so equipped as to be capable of compounding National Formulary preparations on prescription. The "accessory use" section simply limits the sale of drugs other than those listed in the United States Pharmacopoeia to those sold upon prescription.

In that connection, it should be noted that Section 338.210, RSMo 1959, defines the term pharmacy as used in the pharmacy licensing laws as ". . . any pharmacy, drug, chemical store, or apothecary shop, conducted for the purpose of compounding, and dispensing or retailing of any drug, medicine, chemical or poison when used in the compounding of a physician's prescription." Thus, for purposes of the instant problem, a pharmacy is only a store where drugs are sold on prescription of a physician, and the ordinance in question in no way purports to control or regulate what drugs may be sold on prescription or how they will be compounded upon such prescription.

A fair reading of the ordinance fails to reveal any necessary conflict with the provisions of Sections 338.210 through 338.310 which relate to public health and safety or

Mr. Lloyd W. Tracy

the integrity of prescriptions to be compounded in pharmacies affected by it. Therefore, any incidental inhibition of the operation of the pharmacy, (a), supra, is of no official concern to the Board and works no disqualification of the applicant under the state statutes in question. It would be equally unreasonable to deny a license to a pharmacy which, in accordance with local ordinance, closed its doors at midnight in spite of the fact that pharmacy licenses authorize the compounding of prescriptions at any time.

If the ordinance purports to engraft another requirement upon the applicant for a pharmacy license, i.e., that the pharmacy be owned by the owner of the clinic, (b), supra, then the Board may and should disregard such attempted amendment of the statutes by city ordinance and leave to the individual applicant the enforcement of his rights against the city, after the pharmacy license is issued. The statutes relating to pharmacy licenses make no requirement nor impose any restrictions as to the ownership of the premises, only that the pharmacy be under the supervision of a registered pharmacist "or an owner or employee of the owner, who has at his place of business a registered pharmacist. . ." to compound prescriptions.

In short, the enforcement and implementation of city zoning ordinances is not a function of the State Board of Pharmacy. Nor is compliance with zoning ordinances by an applicant for a pharmacy license a properly cognizable condition precedent to the issuance of the license. Where the operation of the pharmacy will be in compliance with the statutes of this state and the regulations of the Board, the Board should leave to local determination the question of whether such operation will conform to local zoning ordinances.

CONCLUSION

On the basis of the foregoing, it is the opinion of this office that restrictions imposed by a city zoning ordinance provide no basis for the Missouri Board of Pharmacy to refuse to license a pharmacy where the pharmacy is otherwise qualified for a license and where such restrictions in no way affect the actual filling of prescriptions.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

Opinion No. 320 Answered by Letter
(Randolph)

September 28, 1964



The Honorable Earl R. Blackwell
State Senator
Twenty-Second District
Hillsboro, Missouri

Dear Senator Blackwell:

This letter is in response to your recent letter requesting an opinion of this office on the following question:

"Can a third class municipality legally enter into an oral contract with the county assessor to furnish an assessment list to said municipality?"

Section 432.070, RSMo, provides as follows:

"No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing."

The Honorable Earl R. Blackwell

This statute requires all contracts made by a municipality to be in writing. The requirements of this section are mandatory and an oral contract made in violation thereof is void ab initio and cannot be rendered valid even after services are performed or work done. St. Francois County v. Brookshire, Mo. Sup., 302 SW2d 1.

Accordingly, it is our opinion that a third class municipality may not legally enter into an oral contract with the county assessor to furnish an assessment list to said municipality.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

DLR:lt

Opinion No. 321
Answered by Letter
by Mr. DeNeen

December 31, 1964

George A. Ulett, M.D.
Director, Division of
Mental Diseases
722 Jefferson Street
Jefferson City, Missouri



Dear Dr. Ulett:

This is in answer to your request of September 17, 1964, in which you ask the following question:

"The Division of Mental Diseases is considering expanding its staff development program.

"This proposed expansion would involve sending our present personnel to approved educational institutions for further training and education at full-time salary.

"Can the Division of Mental Diseases continue to pay full-time salaries to personnel on approved educational leave?"

Section 36.090 (5) dealing with staff training programs provides:

"To develop, in cooperation with appointing authorities and others, who come under the provisions of this chapter (State Merit System) training programs for employees in divisions of the service subject to this chapter:" (Insert ours.)

The above statute authorizes the establishment of a training program for employees under the Merit System. Section 191.070 makes the State Merit System applicable to employees of the Department of Public Health and Welfare of which the Division of Mental Diseases is a division. Thus a training program, as authorized by Section 36.090 (5), may be developed for the employees of the Division of Mental Diseases, who are subject to the merit system.

The next question is whether or not the payment of state funds as salary to personnel under a training program plan which would send such persons to approved educational institutions is a constitutional use of public funds.

Article III, Section 38, (a) dealing with the granting of public money to private persons provides:

"Limitation on use of state funds and credit - exception - public calamity - blind pensions - Old-age assistance - aid to children - direct relief - adjusted compensation for veterans - rehabilitation - participation in federal aid.
The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person* * *".

Article III, Section 39 (1) (2), relating to the powers of the General Assembly to appropriate public money provides:

"Limitation on power of Assembly. The general assembly shall not have power:

"(1) Use of state credit in aid of others
To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation; * * *

"(2) Guarantee of liabilities of others -
To pledge the credit of the state for the payment of the liabilities, present or prospective, of any individual, association, municipal or other corporation;

In State ex rel. Dalton v. Land Clearance for Redevelopment Authority, 364 Mo. 974, 270 SW2d 44, the above three constitutional sections were discussed by the Missouri Supreme Court. In this case the Missouri General Assembly had passed a law which authorized the Redevelopment Authority to condemn and pay landowners of blighted land areas just compensation for their buildings and land. The Redevelopment Authority would then clear the land of all structures and resell the land to other private individuals at a loss. It was unsuccessfully contended in this case that the reselling of the condemned land at a loss to private individuals violated the constitutional prohibitions against giving or lending public funds to a private individual. The Supreme Court of Missouri denied this contention in the following words, l.c. 53:

"* * * The great weight of authority is that there is no private grant when land is cleared for the purposes herein contemplated and is thereafter sold at a loss, but for its then fair value. [citing cases]. In all of these cases it is pointed out that the primary purpose of a redevelopment project is a public purpose, and that any benefits to private individuals are merely incidental to the public purpose. * * *"

Thus an expenditure of public money must be primarily for a public purpose. The employees of the Division of Mental Diseases who would receive a full time salary while attending an approved educational institution under a staff training program contemplated by Section 36.090 (5), supra, are receiving only an incidental benefit from the additional education which they receive. The primary benefit of an adequately trained and educated staff is received by the patients of the state hospital. That the primary purpose of the staff training program is a public purpose is also demonstrated by the enactment of Section 36.090 (5) by the Missouri General Assembly and the undeniable fact that a properly trained mental disease staff will primarily benefit this state in rendering more proficient services and improving the health and welfare of the citizens of Missouri.

The purposes of the Constitutional provisions, supra is not to prevent expenditure of public moneys which benefits private persons if a public purpose is to be served. Thus, in the case of State ex rel. State Industrial Home for Girls vs. Pike County, 144 Mo. 275, 45 W.W. 1096, the Supreme Court approved the use of public funds to provide a home for delinquent girls. Although the young girls received an incidental benefit of food, shelter, and clothing, the primary purpose of the girls' home was a public purpose and thus public funds were properly used.

In the case of State ex rel. King v. Board of Trustees of Firemen's Pension Fund of Kansas City, 184 S.W. 929, 192 Mo. App. 583, the Missouri Supreme Court stated at page 933:

"* * *It is a fundamental principle of the law of this state that public money shall not be paid to a private individual for something wholly disassociated from the interests of the public itself. * * *"

A staff training program would not be wholly disassociated from the interest of the public.

On the contrary, an adequately trained staff is essential for an effective and efficient mental health program, to serve the public interest.

The Missouri courts have also repeatedly stated that a statute such as Section 36.090 (5) dealing with staff training programs will not be held unconstitutional unless the statute clearly and undoubtedly contravenes some constitutional provision, Hickey et al. vs. Board of Education of St. Louis et al., 256 SW2d 775, 778 [8-12]. We are of the opinion that the payment of public funds such as salary to carry out the provisions of Section 36.090 (5) do not contravene the Missouri Constitution.

The next question is whether or not the words "training program" would permit training at approved educational institutions. Section 1.090 relating to the interpretation of statutes provides:

"Words and phrases shall be taken in their plain or ordinary and usual sense, but technical words and phrases having a peculiar and appropriate meaning in law shall be understood according to their technical import."

The words "training program" are used in their plain and ordinary sense. "Training" is defined in Webster's New International Dictionary 2nd Edition, Unabridged, as "providing technical or professional instructions usually with practice under supervision; as a training school for nurses or actors."

Therefore, interpreting the words "training program" in their plain and ordinary sense, we are of the opinion that an educational institution could be a part of a training program for technical or professional instruction when appropriate.

Naturally, educational institutional instructions would require the payment of fees, supplies, books and tuition.

Section 33.170 RSMo 1959, relating to appropriations provides:

"No claim or account shall be preapproved by the comptroller, nor shall any warrant be paid by the state treasurer, unless the money has been previously appropriated by law nor shall the whole amount drawn for or paid under any one head, ever exceed the amount appropriated by law for that purpose."

Section 33.170 RSMo 1959, therefore requires an appropriation which would authorize expenditures for fees, supplies, books

and tuition connected with a training program.

All employees who qualify and are selected to participate in the training program at an educational institution should be limited to courses which are directly related to the training of employees in the performance of his duties with the state. Section 36.090 (5) provides only for "training programs". This implies that the educational courses must directly train the employee in the performance of his work for the state. The length of the educational training program must also be reasonably related to the amount of training necessary to carry out the duties assigned to the employee on behalf of the state.

Lastly, the necessary rules and regulations which determine what expenses are to be paid in each case shall be established by the personnel director of the State Merit System in cooperation with the appointing authority (Director of the Division of Mental Diseases) as provided in Section 36.090 (5) supra. The appointing authority shall also seek the advice of the Mental Health Commission in the training of the personnel as provided in Section 202.031 (6) 1, we quote:

"The Commission shall advise the Director of the Division of Mental Diseases as to all phases of professional standards including patient care and training of personnel * * *".

Very truly yours,

Thomas F. Eagleton
Attorney General

Sheriffs' Bills:
Boarding of Prisoners:

Sheriffs' bills submitted to the
county clerk for board of prisoners
must be based on actual cost in accordance
with the mandate of Section 221.090 (1).

October 12, 1964

Opinion No. 322

Honorable Alden S. Lance
Prosecuting Attorney
County of Andrew
415 West Main Street
Savannah, Missouri



Dear Mr. Lance:

This is in answer to your letter of September 17, 1964, requesting an official opinion of this office in which you ask the following question concerning sheriff bills submitted to the county court by the Andrew County sheriff for board of misdemeanants who have never been imprisoned in the county jail:

"The State Highway Department has a weight station in Andrew County, Missouri, which is a county of the third class, and there are a good many misdemeanants taken to the County Jail by the Highway Patrol. These individuals are turned over to the Sheriff who then 'books' them by making out his standard information card. The Sheriff then allows these individuals to contact an attorney who may get the necessary information and a deposit of money to handle the individual's case in Court, and the misdemeanor is then released to go on his way, or, if it is necessary for the misdemeanor to remain until the next day for some reason or other, the Sheriff, after 'booking' him allows him to go to a local hotel or motel with instructions to report to the Magistrate Court or the Prosecuting Attorney's office the following morning. In neither case does the Sheriff feed or provide actual sleeping quarters for the individual. I wish to point out that these situations arise when the Highway Patrolmen take these individuals to the County Jail during the nighttime when

the offices of the Magistrate and the Prosecuting Attorney are closed, or on holidays when the same situation exists. The Sheriff then submits to the County Court a bill for \$1.25 for board for these individuals and I wish to know whether or not the County Court properly allows the same. The sections of Missouri Law that appear to apply to this situation are 57.290 and 221.090 to 221.110."

Section 221.090 (1), RSMo 1959, dealing with the boarding of prisoners provides:

"In each county of the third or fourth class, the sheriff shall furnish wholesome food to each prisoner confined in the county jail. At the end of each month, he shall submit to the county court a statement supported by his affidavit, of the actual cost incurred by him in the boarding of prisoners, together with the names of the prisoners, and the number of days each spent in jail. The county court shall audit the statement and draw a warrant on the county treasury payable to the sheriff for the actual and necessary cost." (Emphasis added).

The above statute clearly provides that the sheriff is to submit a monthly statement for the "actual cost incurred by him in boarding of prisoners, * * *." This can only be read to mean "actual cost" of boarding prisoners. "Actual cost" is defined in Black's Law Dictionary, 4th Edition, 1951, as "the exact sum expended or loss sustained rather than the average or proportional part of the cost."

Your facts indicate that the sheriff's bills are submitted to the county court on the basis of \$1.25 per day for each prisoner without regard to the fact that some prisoners are not furnished board. Section 221.090 (1) expresses a clear legislative intent that sheriffs' bills for board of prisoners are to be submitted only for "actual cost". If the Legislature had intended some other basis for computing the sheriff's bill, they could have done so easily.

In the case of Maxwell v. Andrew County, 347 Mo. 156, 146 SW2d 621, the sheriff had submitted to the county court a bill of \$75.00 as expenses for his automobile used in official business. This figure was not based upon the statutory requirement of

actual mileage traveled as the basis of computing the bill. The sheriff admitted in his testimony that \$75.00 was only an approximate guess as to the expenses of operating his automobile on official business. The Supreme Court of Missouri held the sheriff's bill to be improper and stated:

"It is well established law that the right of a public officer to be compensated by salary or fees for the performance of duties imposed on him by law does not rest upon any theory of contract, express or implied, but is purely a creature of the statute. * * *"

Thus, whether the sheriff's bill concerns "actual mileage" or "actual cost", the statutes are mandatory and require strict conformity. It is therefore the opinion of this office that Section 221.090 (1) requires that sheriffs' bills for boarding of prisoners in third and fourth class counties be based only upon "actual cost" and not on an estimate or on the number of prisoners.

CONCLUSION

Sheriffs' bills submitted to the county court for boarding of prisoners must be based on actual costs in accordance with the mandate of Section 221.090 (1).

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Jim DeNeen.

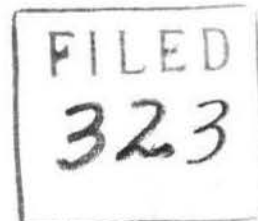
Very truly yours,


THOMAS F. EAGLETON
Attorney General

OFFICERS: Appointed probate judge serves until the next
COUNTY OFFICERS: general election at which a successor is
ELECTIONS: elected.
PROBATE JUDGE:
VACANCIES:

Opinion No. 323

October 13, 1964



Honorable James G. Lauderdale
Prosecuting Attorney
Lafayette County
Lexington, Missouri

Dear Mr. Lauderdale:

This is in answer to your recent request for an official opinion of this office as to whether the person elected to the unexpired term as Probate Judge and Ex-officio Magistrate Judge of Lafayette County takes "office immediately upon being certified and after receiving his commission from the governor or does he wait until the first day of January, 1965?"

Section 105.030, RSMo 1959, is a general statute providing for the filling of vacancies in certain state and county offices and reads as follows:

"Whenever any vacancy, caused in any manner or by any means whatsoever, occurs or exists in any state or county office originally filled by election of the people, other than in the offices of lieutenant governor, state senator or representative, or sheriff, the vacancy shall be filled by appointment by the governor; and the person appointed after duly qualifying and entering upon the discharge of his duties under the appointment, shall continue in office until the first Monday in January next following the first ensuing general election, at which general election a person shall be elected to fill the unexpired portion of the term, or for the ensuing regular term, as the case may be, and the person so elected shall enter upon the discharge of the duties of the office the first Monday in January next

Honorable James G. Lauderdale

following his election, except that when the term to be filled begins on any day other than the first Monday in January, the appointee of the governor shall be entitled to hold the office until such other date. This section shall not apply to vacancies in county offices in any county which has adopted a charter for its own government under section 18, article VI of the constitution."

Section 481.120, RSMo 1959, is a special statute dealing with vacancies in the office of judge of probate. Said section reads as follows:

"When a vacancy shall occur in the office of judge of probate, it shall be the duty of the clerk of the circuit court to certify the fact to the governor, who shall fill such vacancy by appointing some eligible person to said office, who, when qualified, shall continue in office until the next general election, when a successor shall be elected for the unexpired term."

It is noted that under Section 105.030 above, a person appointed by the governor to fill an office therein provided continues in such office until the first Monday in January next following the first ensuing general election--at which such general election a person shall be elected to fill the unexpired portion of such term or for the ensuing regular term as the case may be and that Section 481.120 contains no such provision and of course, herein the difficulty arises.

It is a general rule of statutory construction that where general statutes and a special statute relating to the same subject matter, the special statute will prevail as far as the particular subject matter comes within its provisions. State ex rel. v. Smith, 334 Mo. 653, 67 S.W. (2d) 50.

Following this rule of construction, we believe that Section 481.120, relating to the office of judge of probate would prevail over Section 105.030, relating to numerous offices insofar as the office of judge of probate is concerned.

In the case of State ex rel. Asotsky v. Hicks, 142 S.W.(2d) 472, 473, the Supreme Court of Missouri found occasion to examine a statutory provision substantially like Section 481.120 in regard to a similar question as the one you have presented, and in its opinion the Court said:

Honorable James G. Lauderdale

"This section presents no ambiguity. Under the section, an appointee to a vacancy in the office of justice of the peace holds only until the next general election of county officers."


Following the interpretation of the Hicks case, we are of the opinion that a person appointed to fill a vacancy in the office of judge of probate holds such office only until the next general election at which a successor is elected.

Conclusion

Therefore, it is the opinion of this office that where a vacancy occurs in the office of judge of probate, and such office is filled by the appointment of the governor, as provided in Section 481.120, RSMo 1959, such appointee holds said office until the next general election at which a successor is elected.

The foregoing opinion, which I hereby approve was prepared by my Assistant, Thomas E. Eichhorst.

Very truly yours,

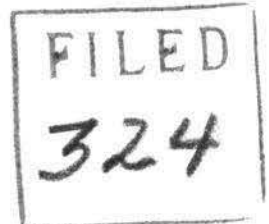

THOMAS F. EAGLETON
Attorney General

ELECTIONS:
VOTING:
OLD AGE ASSISTANCE:
WELFARE:
COUNTY INFIRMARY:
COUNTY POORHOUSE:

Persons who are receiving old age assistance or welfare or general relief payments from the state or county are entitled to vote unless they are actually residing in the county infirmary.

OPINION NO. 324

October 2, 1964



Honorable Francis Toohey, Jr.
Prosecuting Attorney
Perry County
Perryville, Missouri 63775

Dear Mr. Toohey:

In your letter of September 17, 1964, you request an opinion on the following questions:

"1. Are people entitled to vote who are otherwise qualified, who are receiving:

"A. General relief;

"B. Old Age Assistance;

"C. Old Age Assistance and Welfare payments from the County (in this instance the County Welfare payment supplements the Old Age Assistance); and,

"D. Welfare payments from the County."

Article VIII, Section 2, Constitution of Missouri, 1945, defines the qualifications and disqualifications of voters. The only portion of the article pertinent to the question at hand is the following:

"* * * No idiot, no person who has a guardian of his or her estate or person

Honorable Francis Toohey, Jr.

and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote, * * *

Section 111.060, RSMo 1959, on the qualifications of voters contains the identical provisions:

"Qualifications of voters. -- All citizens of the United States, including residents of soldiers' and sailors' homes, over the age of twenty-one years who have resided in this state one year, and the county, city or town sixty days immediately preceding the election at which they offer to vote, and no other person shall be entitled to vote at all elections by the people. Each voter shall vote only in the township in which he resides, or if in a town or city, then in the election district therein in which he resides. No idiot, no insane person and no person while kept in any poorhouse at public expense or while confined in any public prison shall be entitled to vote at any election under the laws of this state; nor shall any person convicted of a felony, or of a misdemeanor connected with the exercise of the right of suffrage, be permitted to vote at any election unless he shall have been granted a full pardon; and after a second conviction of felony or of a misdemeanor connected with the exercise of the right of suffrage, he shall be forever excluded from voting."

It will be noted that the prohibition against an indigent voting is confined to those persons "in a poorhouse at public expense".

Section 205.590 defines poor person as follows:

"Who deemed poor. -- Aged, infirm, lame, blind or sick persons, who are unable to support themselves, and when there

Honorable Francis Toohey, Jr.

are no other persons required by law and able to maintain them, shall be deemed poor persons."

Section 205.660 provides for the maintenance of the poor in a poorhouse. The disqualification plainly states that inmates of a poorhouse at public expense are not qualified. Hence, those persons who are not inmates of a poorhouse but who receive public assistance through Old Age Assistance, welfare payments or other forms of public assistance or charity are not disqualified from voting.

This office has made similar holdings in an opinion to Mrs. W. H. Henton dated July 12, 1934, and an opinion to Owen G. Jackson dated October 20, 1936. A recent holding of the Supreme Court substantiates the position we have taken.

In New v. Corrough, 370 S.W. 2d 323, the court said, l.c. 327:

"Art. VIII, § 2, of the Constitution, V.A.M.S. provides that 'no person while kept in any poor house at public expense * * * shall be entitled to vote'. The attack upon the validity of the absentee ballots cast by the four inmates of the Nodaway Home would require a finding that the home was a county poor house and that the payment of \$5 a month toward their upkeep from the welfare funds of the County would amount to their being kept at public expense. This privately-operated nursing home cannot be classed as a county poor house in these circumstances. The County had no priority in the admission of patients and it made similar payments from its welfare funds to other privately-operated nursing homes. Furthermore, a person who is 'an inmate of a public institution' is not eligible for Old Age Assistance under § 208.010, subd. 2 (5), RSMo 1959, V.A.M.S. The trial court did not err in approving the right of these four patients to vote in the election."

Honorable Francis Toohey, Jr.

Persons maintained in a "poorhouse" at public expense are disqualified from voting. But, those persons receiving aid or public assistance from whatever source who are not inmates of a "poorhouse" are not disqualified, if they are otherwise eligible to vote.

CONCLUSION

It is the opinion of this office that pursuant to the provisions of Article VIII, Section 2 of the Constitution, and Section 111.060, RSMo 1959, inmates of poorhouses who are supported by the public are prohibited from voting, but those persons receiving public aid or assistance of any nature and who are not inmates of a poorhouse are not disfranchised.

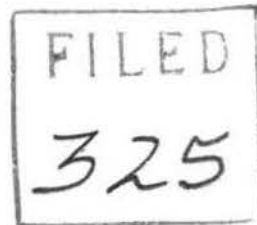
The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,



THOMAS F. EAGLETON
Attorney General

(Answered by letter)



October 16, 1964

Mr. Harold Owens, Executive Secretary
State Soil and Water Districts Commission
T-7 Building
University of Missouri
Columbia, Missouri

Dear Sir:

Your recent request for an opinion raises two questions concerning the disestablishment of a soil and water district. Your questions read as follows:

"1. Is a hearing to be held in the steps to disestablish a district? The statutes do not specify this in section 278.150.

"2. Is there a two year waiting period required before holding another referendum on the proposition of disestablishing a district? Under section 278.100, Para 2., the Statutes states, 'That the question of establishment to have been lost, although another referendum on this question may be called--for this area at any time after two years from the date of this declaration.'"

The establishment of a soil and water district is provided by Section 278.100, RSMo. Supp. 1963. A soil and water district may not be properly established unless the statutory procedure, so provided, is followed. The procedure requires the Missouri Soil and Water Districts Commission to call a public hearing after receiving a petition from the appropriate number of land representatives declaring that the saving of soil and water in the area is a public necessity. If the Commission finds at the public hearing that the general desire

Mr. Harold Owens

in the area is in favor of such a district, they shall conduct a survey of the conditions in the area to determine if a soil and water district is feasible and necessary. If the Commission reaches a favorable conclusion, they shall call and conduct a referendum on the question of establishing such a soil and water district. If the majority of all land representatives voting, vote in favor of the establishment of such district, the Commission at once declares such district established. However, if a majority of those voting do not vote in favor of the district, it shall be declared lost, and the Commission may not call for another referendum until after two years has passed.

The disestablishment of a district, like the establishment, must be provided for by statute. If no procedure is provided, a district once established properly, may not be disestablished. See State ex rel. Davidson v. Mo. State Life Insurance Co., 228 Mo. App. 38; and Opinion of Attorney General, No. 72, to Honorable William J. Esely, April 3, 1963, which is enclosed.

The legislature has provided for a method to disestablish soil and water districts in Section 278.150, RSMo, which provides as follows:

"1. The state soil and water districts commission upon receiving at any time a petition for the disestablishment of any soil and water district, said petition being signed by not less than twenty-five land representatives in each township within the area covered by the petition, shall presently call for and conduct within that district a referendum upon the disestablishment of that district; and if a majority of the land representatives voting in this referendum do vote in favor of the disestablishment, the soil and water commission shall declare that district to be disestablished, and the soil and water supervisors of that district may not thereafter enter into any contracts or agreements on behalf of that district."

It is clear from the statute that there is no requirement for a hearing to determine whether a general desire favoring disestablishment exists prior to calling and conducting a referendum upon disestablishment. The commission is not given such discretion. The calling of the referendum must presently follow the receipt of the petition.

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It is also clear that such a referendum for disestablishment must be called, whenever a proper petition for disestablishment is received. There is no waiting period after a referendum in which disestablishment did not receive a majority of the votes of the land representatives voting within which another referendum for disestablishment may not be conducted.

The two year waiting period between referendums for establishment of a district does not apply to referendums for disestablishment of a district. It is limited only to unfavorable voting upon the establishment of a district. A petition for disestablishment may be filed with the Commission "at any time" and the Commission is then required to call and conduct a referendum presently.

Therefore, it is the opinion of this office that under Section 278.150, RSMo. Cum. Supp. 1963: (1) A public hearing is not required after a petition for disestablishment of a soil and water district is received by the Missouri Soil and Water Districts Commission; (2) There is no required waiting period between referendums for disestablishment of soil and water districts. They are to be called presently any time a petition for disestablishment is received by the Commission.

I am also enclosing a petition heading for the disestablishment of a Soil and Water District as per your request.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JDF/dg

Enclosures

October 28, 1964



Honorable Rolin T. Boulware
Prosecuting Attorney
Shelby County Courthouse
Shelbyville, Missouri

Dear Sir:

This is in answer to your inquiry of September 18, 1964, as to whether or not there must be a separate polling place in each of the six districts of the Clarence Nursing Home District.

We believe that the applicable statutory provisions are as follows:

Section 198.280, Paragraph 1, RSMo. Cum. Supp. 1963:

"1. After the nursing home district has been declared organized, the declaring county court shall divide the district into six election districts as equal in population as possible, and shall by lot number the districts from one to six inclusive. The county court shall cause an election to be held in the nursing home district within ninety days after the order establishing the nursing home district to elect nursing home district directors. The election shall be called, held and conducted and notice shall be given as provided in sections 198.240 to 198.270, and each voter shall vote for six

Honorable Rolin T. Boulware

directors, one from each district.
The director elected from district number one shall serve a term of one year, the director elected from district number two shall serve a term of two years, the director elected from district number three shall serve a term of three years, the director elected from district number four shall serve a term of four years, the director elected from district number five shall serve a term of five years, and the director elected from district number six shall serve a term of six years; thereafter, the terms of all directors shall be six years. All directors shall serve until their successors are elected and qualified." (Emphasis added).

Section 198.250, RSMo. Cum. Supp. 1963:

"Notice of the election shall be given by publication on three separate days in one or more newspapers having general circulation within the territory, the first of which publications shall be not less than thirty days prior to the date of the election, and by posting notices in ten of the most public places in the territory, and in case no newspaper has a general circulation in the territory, the notices shall be so posted in fifteen of the most public places therein, not less than thirty days prior to the date of the election. Each notice shall state briefly the purpose of the election, setting forth the proposition to be voted upon, form of ballot to be used at the election, a description of the territory, set forth the election precincts, and designate the polling places therefor. The notice shall further state that any district upon its

Honorable Rolin T. Boulware

establishment shall have the powers,
objects and purposes provided by
sections 198.200 to 198.350, and
shall have the power to levy a proper-
ty tax not to exceed fifteen cents on
the one hundred dollars valuation."
(Emphasis added)

We do not note any court cases construing these two statutory provisions. However, we assume that the county court has met the mandate of Section 198.280 by establishing six election districts as nearly equal in population as possible. From the above statutory language it should be noted that one election, not six elections, is contemplated and further, it appears that these provisions authorize the designation of "election precincts" and "polling places" on a discretionary basis.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

ELECTIONS: County Clerk cannot require application
BALLOTS: for absentee ballot to be sworn to.
ABSENTEE BALLOTS:
COUNTY CLERK:
AFFIDAVITS:

OPINION NO. 327

October 13, 1964



Honorable Virgil Conkling
Prosecuting Attorney
Wayne County
Piedmont, Missouri

Dear Mr. Conkling:

Your letter of September 18, 1964, requests an opinion concerning applications for absentee ballots.

Your letter, in part, states:

"Section 112.030, Revised Statutes of Missouri, 1961, charges the County Clerk with the task of ascertaining the right of each applicant to vote at such election, by 'examination of the records, or otherwise'. In the absence of permanent registration there was no election records, as such, to examine."

You ask if the county clerk is authorized to require applications for absentee ballots to be verified. Section 112.020, RSMo 1959, provides:

"Application for ballot made in person or by mail.--Any elector as defined in the foregoing section expecting to be absent from the county of his residence on the day of the election, or expecting to be prevented through illness or physical disability from personally going to the polls to vote on election day, within thirty days next before the date

Honorable Virgil Conkling

of the election and up to six o'clock p.m. on the day before any election, may make application in person, or by mail, to the county clerk or, where existing, to the board of election commissioners, or other officer or officers charged with the duty of furnishing ballots for the election in his voting precinct, for an official ballot for the precinct to be voted at the election. In the event the elector recovers from his illness or physical disability sufficiently to permit him to present himself at the proper polling place for the purpose of casting his ballot, or in the event the elector, having expected to be absent, is in the county of his residence on election day, the absentee ballot cast by the elector shall be void, and the elector shall notify the county clerk of the removal of the disability before six o'clock p.m. on the day following the day of election."

It will be noted that an elector may make application either in person or by mail, and that the application should contain a statement concerning his expected absence from the county or the facts relative to his illness. There is no requirement that the statement be verified.

Section 112.030, RSMo, (Cum. Supp. 1963) requires that the application may be made on a blank furnished by the county clerk or in writing sent by first-class mail. It provides further that the county clerk shall furnish the elector with the ballot after ascertaining his right to vote and that the county clerk shall not furnish the ballot to anyone not lawfully entitled to vote.

Again, there is no requirement that the written application shall be verified or if he applies in person that he be questioned under oath. No precise method is outlined as to how the determination shall be made concerning his right to vote other than "examining the records".

Honorable Virgil Conkling

This means that the county clerk should make any investigation that he deems necessary and should not furnish the elector with the absentee ballot if the clerk determines that the applicant is not "lawfully entitled to vote".

Under Section 11472, RSMo 1939, the applicant for an absentee ballot was required to sign an affidavit, verifying the facts in his application.

The repeal by the Legislature of this requirement evidences an unmistakable intent by the Legislature to eliminate the requirement that the application for an absentee ballot must be verified by affidavit of the applicant.

Under Section 112.050 no charge can be made for the acknowledgment of affidavits prescribed in Chapter 112, RSMo. Therefore, if the county clerk or election board could make a rule requiring an affidavit, a charge could be made by the notary public for the affidavit which is not "prescribed" in such chapter. This obviously would be contrary to the intent of this chapter - that no charge for affidavits should be made. This is a further reason indicative of the legislative intent to eliminate the affidavit.

If the elimination of this affidavit from the application seems to indicate a relaxation of precautionary measures, we wish to point out that Section 112.040, RSMo 1959, requires that the absentee voter return the ballot in an official envelope containing an affidavit wherein the elector swears that he is lawfully entitled to vote, the reason why he cannot vote on election day and other pertinent facts concerning his eligibility to vote.

Section 112.040, RSMo 1959, provides:

"Official to initial ballots and enclose in envelopes for transmission to voter--
form of envelope--official's affidavit.--
It shall be the duty of the county clerk or board of election commissioners or other officer or officers as aforesaid to write upon such ballot or ballots his or

Honorable Virgil Conkling

their initials, and enclose such ballot or ballots in an envelope unsealed to be furnished by such clerk or other proper officials; which envelope shall bear the name, official title and post office address of such officer or officers, and upon the other side a printed affidavit in substantially the following form:

"State of)
"County of) ss.

"I, do solemnly swear that I am a resident of the precinct of the town or city of or/of the ward in the town or city of residing at in said town or city in the county of and state of Missouri, or/that I am a resident of the precinct of township in the county of and state of Missouri, and not living in a town or city, that I have been a resident of such ward or precinct for months last past; that I am lawfully entitled to vote in such ward or precinct at the election to be held on; that on account of
(Absence from the county of my residence, illness or physical disability)
I expect to be prevented from going to the polls to vote on such election day.

"I further swear that I marked the enclosed ballot in secret, and that I have not voted and will not vote elsewhere, or otherwise than by this ballot at this election.

.....

"Subscribed and sworn to before me, an officer duly authorized under the laws of this state to administer oaths, this day of A.D.

Honorable Virgil Conkling

and I hereby certify that the affiant has exhibited the enclosed ballot to me unmarked, and that he then in my presence, and in the presence of no other person and such manner that I could not see his vote, marked such ballot and enclosed and sealed same in this envelope without my seeing or knowing his vote, and that the affiant was not solicited or advised by me to vote for or against any candidate or proposition.

.....
"(Official capacity)".....

If the elector falsely swears to this affidavit, he may be prosecuted under Section 112.110 for the commission of a felony.

CONCLUSION

It is the opinion of this office that an elector may apply for an absentee ballot, either by mail or in person, that the county clerk is not authorized to require the application to be verified by affidavit of the applicant, that it is the duty of the county clerk to ascertain if the elector is legally entitled to vote by such means as are reasonable and necessary, and that if the elector falsifies the required official affidavit on the envelope containing his ballot, he may be prosecuted as provided by Section 112.110, RSMo 1959.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,

Thomas F. Eagleton
THOMAS F. EAGLETON
Attorney General

ELECTION:

Third Class counties without voting machines are not required to print and distribute sample ballots in General Elections.

SAMPLE BALLOTS:

September 29, 1964

OPINION NO, 328

Honorable Earl L. Veatch
Prosecuting Attorney
Lewis County Courthouse
Monticello, Missouri



Dear Mr. Veatch:

In your letter of September 19, 1964, you inquire as to the necessity for the printing of sample ballots for the General Election held on the Tuesday succeeding the first Monday of November of even numbered years.

Lewis County is a county of the third class and does not have voting machines. It is our opinion therefore that Chapter 111, RSMo 1959, is applicable. This chapter provides that in General Elections the county shall furnish ballots and it provides the form thereof. We find no provision applicable to these facts that requires the county to print and distribute sample ballots in General Elections.

CONCLUSION

Therefore, we are of the opinion that third class counties without voting machines are not required to print and distribute sample ballots in General Elections.

The foregoing opinion which I hereby approve, was prepared by my assistant, Clyde Burch.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

BONDS:
COUNTY COURT:
OFFICE SPACE:
PUBLIC ADMINISTRATOR:

1. County court is not required to but may furnish an outgoing public administrator with an office.
2. County court has no obligation to pay the bond premium of incumbent or outgoing public administrator.

November 10, 1964

OPINION NO. 331

Honorable Don E. Burrell
Prosecuting Attorney
Greene County
Springfield, Missouri 65802



Dear Mr. Burrell:

Your recent request for an opinion raised two questions concerning public administrators.

Your first question may be restated as follows:

Does the county court have an obligation to provide an office for an outgoing public administrator during the course of the year within which he can wind up matters pending after his successor in office has qualified?

Section 473.767, RSMo, permits a public administrator, who was defeated or did not run for re-election, one year after his successor has qualified within which to file his final settlement of estates in his charge as public administrator. It is to be noted that the one year period is permissive rather than mandatory. An outgoing public administrator may settle up at any time before the one year period expires.

There is a general statute concerning the duty of the county to provide office space for county officers. It is Section 49.510, RSMo, which provides:

"It shall be the duty of the county to provide offices or space where the officers of the county may properly carry on and perform the duties and functions of their respective offices. Said county shall maintain, furnish and equip said offices and provide them with the necessary stationery, supplies, equipment, appliances and furniture, all to be taken care of and paid out of the county treasury of said county at the time and in the manner that the county court may direct."

November 9, 1964

However, with regard to public administrators, the Legislature has enacted a special statute regarding office space, Section 473.737, RSMo. This statute provides for such office if there is space available in the courthouse and only when the court is of the opinion that the business is such as to reasonably require a separate office as a public convenience. Section 473.737 provides as follows:

"Each public administrator elected, as now or as hereafter provided for in sections 473.730 to 473.767, is hereby declared to be an officer for the county in which he is elected and for the city of St. Louis, if elected therein. The county courts of each county in this state shall make suitable provision for an office for the public administrator in the courthouse of the county if suitable space may be had for same, and shall be provided as soon as the county court shall be of the opinion that the business in charge of the public administrator is such as to reasonably require a separate office for the convenience of the public. The public administrator of the city of St. Louis shall have suitable and convenient offices provided for him in the civil courts building by said city."

It is a general rule of statutory construction that special statutory provisions prevail over general broad provisions. *Baker v. Goodman*, 364 Mo. 1202, 274 SW2d 293. Where two statutes relate to the same subject, they must be read together, and provisions of one having special application to a particular subject are to be deemed qualifications of or exceptions to the other act in its general terms. *Veal v. City of St. Louis*, 365 Mo. 836, 289 SW2d 7.

Therefore, the special provisions regarding offices for public administrators found in Section 473.737, RSMo, prevails over the general provisions for county officers' offices found in Section 49.510, RSMo. The county court has no duty to furnish the public administrator an office. The county court need only furnish the public administrator an office if there is space available in the courthouse and if the court is of the opinion that the work load is such that it would be a public convenience to grant him such office.

It is the opinion of this office that Section 473.737, RSMo, applies not only to the incumbent public administrator but also to his predecessor during the one year period he is allotted to make

November 10, 1964

his final settlement. Certainly the Legislature did not intend that the county court have a greater obligation with respect to furnishing office space to the outgoing public administrator than to the incumbent. Therefore, the county court is not required to furnish the outgoing public administrator with an office during the period he has to settle his estates. However, the county court may furnish him an office if space is available in the courthouse and if it finds that the public convenience so requires.

Your second question reads as follows:

"I would also like your opinion as to whether or not the County Court has the obligation to pay the bond premium required by a Public Administrator and whether the County Court would be required to pay the bond premium to cover the outgoing Public Administrator during the year which he has to wind up his affairs if the Court does have this obligation."

We are enclosing a copy of an opinion of this office to Honorable James D. Clemens under date of April 10, 1941, which answers your question. The opinion concludes that "the County Court is not authorized to pay the premium on the bond required of a public administrator." This opinion applies to outgoing public administrators as well as incumbents. The Legislature did not intend that the outgoing public administrator be placed in a better position than the incumbent.

CONCLUSION

Therefore, it is the opinion of this office that: (1) The county court is not required to but may furnish an outgoing public administrator with an office during the course of the year that he has to wind up matters pending after his successor in office has qualified if there is space available in the courthouse and if the public convenience so requires; (2) The county court has no obligation to pay the bond premium of incumbent public administrator or of the outgoing public administrator.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Jeremiah D. Finnegan.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

BANKS:
LIQUIDATION PROCEEDINGS:
DIVISION OF FINANCE:
COMMISSIONER OF FINANCE:

The Division of Finance may in its discretion properly advise the FDIC not to pay certain claims of corporate depositors asserted against the FDIC when an officer or debtor of a bank in liquidation has a financial interest in such corporate depositor.

OPINION NO. 338

November 2, 1964



Honorable Robert B. Mackey
Commissioner, Division of Finance
State of Missouri
12th Floor, Jefferson Building
Jefferson City, Missouri

Dear Mr. Mackey:

You have requested an official opinion of this office on the question of whether the Division of Finance may properly refuse to release deposits of corporations in a bank or trust company which is in the process of liquidation in the hands of the Division of Finance, in cases where persons having substantial interests in those depositor corporations are directors or borrowers of the bank or trust company in liquidation. The bank's deposits are insured by the Federal Deposit Insurance Corporation. We understand that by the terms "release" and "refusal to release" you mean advising the Federal Deposit Insurance Corporation either to pay or not to pay certain claims of depositors asserted against the FDIC.

Liquidation of banks and trust companies by the Division of Finance is governed by Chapter 361, RSMo 1959. Section 361.300 authorizes the finance commissioner to take possession of the business and property of a bank or trust company under certain circumstances. Section 361.510 provides that the commissioner shall notify all persons who may have claims against the bank or trust company to present such claims to him with proper proof thereof within four months from the date of the notice. Section 361.540 provides that the commissioner shall not later than thirty days after the time has expired to file objections to the claims, approve or reject every claim to which objections are not still pending. Section 361.570 provides for dividends to be paid by the commissioner on the order of the Circuit Court to creditors from funds remaining in the commissioner's hands.

The background of your inquiry is that a director of a bank in liquidation is the principal stockholder in a corporation with a deposit in the bank, and that there are other corporate depositors in which several of the bank's debtors are substantially interested. Your question concerns a situation that arises prior to the time for filing claims in the Circuit Court liquidation proceedings outlined above. You ask about the legality of refusing to release certain deposits; that is, advising the FDIC not to pay certain claims asserted against it until after the liability of directors and debtors with financial interests in the corporate depositors has been determined.

We feel that the commissioner has the discretion to advise the FDIC either to pay or not to pay certain claims of depositors. The claims of officers and stockholders as depositors in the assets of an insolvent bank are accorded the same rights as other depositors similarly situated. Therefore, innocent officers or stockholders of a bank are entitled to be paid as depositors in the distribution of its assets; however, the liquidation proceedings are in equity and the claims of officers or stockholders whose wrongdoing or mismanagement has contributed to the insolvency of the bank may be postponed until satisfaction of the claims of other depositors. One of the primary duties of the commissioner is to protect innocent depositors.

The FDIC after paying claims against it, files a claim in the liquidation proceedings. Those depositors who have not been paid by the FDIC may likewise file their claims. When the time arises for the commissioner to either accept or reject claims pursuant to the cited statutes, it may appear that the claims involved ought to be paid. If so, the commissioner may so advise the FDIC and, as we understand the situation, the FDIC would pay those claims. However, at the time for approval or rejection of claims by the commissioner, it still may not appear that the claims should be paid and the commissioner has the right to reject claims if he doubts the justice or validity thereof, Section 361.540(3), RSMo.

Since the statute accords such discretion to the commissioner of finance, it is certainly consonant with this discretion for the commissioner to advise the FDIC concerning the payment of claims against the FDIC asserted by depositors.

CONCLUSION

It is the opinion of this office that the Division of Finance may in its discretion properly advise the FDIC not to pay certain claims of corporate depositors asserted against the FDIC when an officer or debtor of a bank in liquidation has a financial interest in such corporate depositor.

The foregoing opinion, which I hereby approve, was prepared by my assistant Donald L. Randolph.

Very truly yours,

Thomas F. Eagleton
THOMAS F. EAGLETON
Attorney General

Opinion No. 340

November 6, 1964



Honorable William G. McCaffree
Prosecuting Attorney
Vernon County
Reed Building
Nevada, Missouri

Dear Mr. McCaffree:

This is in answer to your recent request for an official opinion of this office, which asks four questions relating to the abolition of the township form of government.

Section 65.620, RSMo Supplement, 1963, is controlling, and reads as follows:

"1. Whenever any county abolishes township organization the county treasurer and ex-officio collector shall immediately settle his accounts as treasurer with the county court and shall thereafter perform all duties, exercise all powers, have all rights and be subject to all liabilities imposed and conferred upon the county collector of revenue under chapter 52 RSMo until the first Monday in March after the general election next following the abolishment of township organization and until a collector of revenue for the county is elected and qualified. The person elected collector at the general election as aforesaid, if said election is not one for collector of revenue under chapter 52 RSMo, shall serve until the first Monday in March following the election and qualification of

Honorable William G. McCaffree

a collector of revenue under chapter 52 RSMo. Upon abolition of township organization a county assessor and county treasurer shall be appointed to serve until the expiration of the terms of such officers pursuant to chapters 53 and 54 RSMo.

"2. Upon abolition of township organization, title to all property of all kinds theretofore owned by the several townships of the county shall vest in the county and the county shall be liable for all outstanding obligations and liabilities of the several townships.

"3. The terms of office of all township officers shall expire on the abolition of township organization and the township trustee of each township shall immediately settle his accounts with the county clerk and all township officers shall promptly deliver to the appropriate county officers, as directed by the county court, all books, papers, records and property pertaining to their offices."

Your first question asks:

"Shall the Township Collectors now holding office complete their duties under Sec. 65-460 RS 1959, making their final settlement in March of the following year?"

This must be answered in the negative as Subsection 3 of the above quoted Section provides that "The terms of office of all township officers shall expire on the abolition of township organization" Therefore, the township collectors duties end on the abolition of the township organization. The provisions in Subsection 1 of Section 65.620, RSMo Supplement, 1963 referring to March relate to the county collector and does not pertain to the township collectors.

Honorable William G. McCaffree

Your second and third questions read as follows:

"I interpret Sec. 65-620 to mean that the County Court will immediately absorb all assets and liabilities of Townships.

"One Township has a \$10,000 bond issue voted April, 1963, in which the levy is 45¢ on the one hundred dollar valuation to be paid off in 1968. Shall this indebtedness be absorbed by the County if the issue passes or continue to be an obligation of the Township should County Form of Government be voted?"

As provided for by Subsection 2 of Section 65.620, RSMo Supplement, 1963, the County Court will immediately absorb all assets and outstanding liabilities of the townships. This subsection reads in part, that "Upon abolition of Township organization, title to all property of . . . the several townships . . . shall vest in the county" Further, in this Subsection, it is provided that "the county shall be liable for all outstanding obligations and liabilities of the several townships." Therefore, the county shall absorb the indebtedness of the township when it is abolished.

Your fourth question asks:

"Does the present County Treasurer & Ex-Officio [collector] serve as Collector of Revenue even though defeated in the General Election the same day that Township Organization is abolished?"

This question is answered affirmatively in that Subsection 1 of Section 65.620, RSMo Supplement, 1963 specifically provides that when a county abolishes the township organization, the person serving as "the county treasurer . . . shall immediately settle his accounts as treasurer . . . and shall thereafter perform all duties, exercise all powers, have all rights and be subject to all obligations imposed and conferred upon the county collector of revenue . . . until the first Monday in March after the general election next following the abolishment of township organization

Honorable William G. McCaffree

and until a collector of revenue for the county is
elected and qualified."

Very truly yours,

THOMAS F. EAGLETON
Attorney General

TEE/dg

October 16, 1964



Honorable Ralph H. Duggins
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

By letter dated September 30, 1964, you requested an opinion from this office pursuant to Section 377.170, RSMo 1959, as to whether documents submitted by the United Mutual Insurance Company are in proper legal form for the acceptance of the provisions of Sections 376.010 to 376.670, RSMo 1959, by a life insurance company doing business on the assessment plan under Sections 377.010 to 377.190, RSMo 1959. These documents consist of the proposed Articles of Incorporation, Minutes of Special Meeting of Board of Directors Meeting, Notice to Directors, and Certificate of Amendment.

Section 377.170, RSMo 1959, provides that the articles of incorporation shall be amended to conform to Sections 376.010 to 376.670, RSMo 1959, as if the company had originally been incorporated thereunder.

Your attention is directed to Article IV, paragraph 7 of the proposed Articles of Incorporation which provides as follows:

"The property and business of the corporation shall be managed and controlled by the Board of Directors consisting of not less than seven nor more than thirteen persons, who shall be elected at each annual meeting of shareholders. Vacancies on said board shall be filled by agreement of a majority of the directors voting on the proposition. A quorum of the board of directors shall consist of four."

Honorable Ralph H. Duggins

The above quoted provision does not conform with that part of Section 376.060, RSMo 1959, which provides that the charter shall set forth:

"(5) The manner in which the corporate powers granted by sections 376.010 to 376.670 shall be exercised, showing the number of directors, which shall not be less than nine or more than twenty-one, their powers and duties, the manner of electing them, the mode of filling vacancies, and such other particulars as may be necessary to make manifest the objects and purposes of the corporation, and the manner in which it is to be conducted."

In order to conform to the cited statute, Article IV, paragraph 7 of the proposed Articles of Incorporation should disclose the exact number of directors to be chosen. The number must be not less than nine nor more than twenty-one and any change in the number of directors will have to be accomplished by an amendment to the Articles of Incorporation rather than by a change in the bylaws.

Your attention is also directed to Article V of the proposed Articles of Incorporation which authorizes the issuance of 1,000,000 shares of stock at a par value of \$1.00 each. It is further provided that 200,000 shares are to be issued and sold to the original purchasers for \$2.00 per share before the corporation shall commence business. The charter does not require that the remaining 800,000 shares be issued and sold before the corporation commences business.

The provisions of Article V of the proposed Articles of Incorporation referred to above do not conform to that part of Section 376.280, RSMo 1959, which provides in part that no joint stock or stock and mutual company shall commence to do any business unless the full amount of capital stock and surplus named in its charter or articles of association has been paid in.

For the reasons above stated the legal form of the proposed Articles of Incorporation of the United Mutual Insurance Company is not approved.

Honorable Ralph H. Duggins

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Yours very truly,

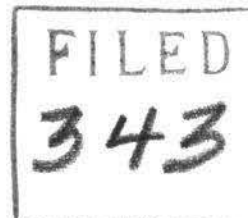
THOMAS F. EAGLETON
Attorney General

TJD/dg

INSURANCE: Articles of Incorporation of Family Benefit
Life Insurance Company

OPINION NO. 343

October 12, 1964



Honorable Ralph H. Duggins
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

By letter dated September 30, 1964, you requested an opinion from this office as to whether documents submitted by the Family Benefit Life Insurance Company are in accordance with Chapter 376 of the Statutes and are not inconsistent with the constitution and laws of this state and the United States. These documents consisted of an executed copy of the Declaration of Intention of the original incorporators of the Family Benefit Life Insurance Company, a copy of the Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959, and the Publisher's Affidavit as to publication of said Articles as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1959, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

TJD:mje

CAMPAIGN EXPENSES: Political committee assessments are
ASSESSMENTS: reportable campaign expenses.

Opinion No. 344

November 30, 1964

FILED
344

Mr. James A. Dunn
Assistant Prosecuting Attorney
Joplin, Missouri

Dear Mr. Dunn:

In your letter of September 27, 1964, you state that republican candidates for county office in Jasper County pay an assessment to the Jasper County Republican Committee Fund and you inquire as to whether these assessments are campaign expenditures, as contemplated by the Corrupt Practices Act, so that they should be recorded in the recorder's office when the candidate files his affidavit of campaign expenses.

It is our view that your question involves an interpretation of Section 129.120, RSMo 1959. That Section reads as follows:

"Every person who shall be a candidate before any caucus or convention, or at any primary election, or at any election for any state, county, city, township, district or municipal office, or for senator or representative in the general assembly of Missouri, or for senator or representative in the Congress of the United States, shall, within thirty days after the election held to fill such office or place, make out and file with the officer empowered by law to issue the certificate of election to such office or place, and a duplicate thereof with the recorder of deeds for the county in which such candidate resides, a statement in writing, which statement and duplicate shall be subscribed and sworn to by such candidate before an officer authorized to administer oaths, setting forth in detail all sums of money, except all sums paid for actual traveling expenses, including hotel or lodging bills, contributed,

Mr. James A. Dunn

disbursed, expended or promised by him, and, to the best of his knowledge and belief, by any other persons or person in his behalf, wholly or in part, in endeavoring to secure or in any way in connection with his nomination or election to such office or place, or in connection with the election of any other persons at said election, and showing the dates when and the persons to whom and the purposes for which all such sums were paid, expended or promised. Such statement shall also set forth that the same is as full and explicit as affiant is able to make it. No officer authorized by law to issue commissions or certificates of election shall issue a commission or certificate of election to any such person until such statement shall have been so made, verified and filed by such persons with said officer."

The language of the above section is general and inclusive and it does not purport to exclude contributions simply because they might be construed to be assessments rather than voluntary donations. It should further be noted that this section uses the language "setting forth in detail all sums of money" and thereafter expressly excludes "traveling expenses" only. This section also provides that campaign expenses shall be reported if they are expended "in connection with the election of any other persons at said election". As we understand the facts of your case it is admitted that such funds are so used.

As to what constitutes campaign activity, we believe that this is properly defined in *Norris vs. United States*, C.C.A. Neb., 86 F.2d 379, 382, as follows:

"The word 'campaign,' when applied to a personal political candidacy, means all the things and necessary legal and factual acts done by the candidate and his adherents in an effort to obtain a majority or plurality of the votes to be cast in any election for a public office. In short, a campaign for a public office in a public election merely and simply means running for office, or candidacy for office, as the word is used in common parlance and as it is understood by the man in the street."

Mr. James A. Dunn

CONCLUSION

Therefore, we believe that the described political committee assessments are reportable campaign expenses.

This opinion, which I hereby approve, was written by my Assistant, Clyde Burch.

Very truly yours,

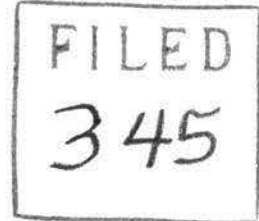
Thomas F. Eagleton
THOMAS F. EAGLETON
Attorney General

ELECTIONS:
VOTING:
POLITICAL PARTIES:
WRITE-IN VOTES:

Write-in votes must be counted and totaled without regard to the party ticket the voter chances to use.

Opinion No. 345

October 15, 1964



Honorable Thomas O. Pickett
Prosecuting Attorney of Grundy County
924 Main Street
Trenton, Missouri

Dear Mr. Pickett:

This is in answer to your official opinion request concerning the counting of write-in ballots in which you ask the following question:

"The specific problem is whether write-in ballots for the same person on the Democratic, Republican and Independent columns of the ballots will be counted as a total for the benefit of said person whose name is written in or whether said votes will be counted only separately under the particular party affiliation for which cast."

At the outset of this opinion, we may simply state that this office cannot find statutory or case authority which would uphold the segregation of write-in votes as Democratic, Republican or Independent in counting the total votes for write-in candidates.

Section 111.580 (2) dealing with write-in votes provides:

"(2) If the voter desires to vote for one or more candidates whose name or names do not appear on the printed ballot he may do so by drawing a line through the printed name of candidate for such office, and writing below such canceled name the name of person for whom he desires to vote, and placing a cross mark in the square at the left of such name. The squares so marked shall take precedence over the cross marked in the circle."

Section 111.660 dealing with the procedure per entry of votes into the poll book provides:

"The clerk shall enter in separate columns, under the names of the persons voted for, as provided in the form of the poll books, all the votes read by the counting judges."

Section 111.670 dealing with the counting of votes provides:

"After the examination of the ballots shall be completed, the whole number of votes for each person shall be enumerated under the inspection of the judges, and set down as directed in the form of the poll books, and be publicly proclaimed to the persons present."

Section 111.580 (2), supra, dealing with write-in votes, authorizes such a vote as a legally cast vote. Section 111.660, supra, dealing with entry of votes into the poll book directs that the poll clerk shall enter into the poll book, under the name of the person voted for, all the votes read by the counting judge. No statutory provision is found which would authorize segregating write-in votes for a candidate into Democratic, Republican or Independent columns in a poll book. This section specifically provides that "all the votes" are to be entered under the name of the candidate. The form of the poll book is clearly set out in Section 111.510. No provision is made therein for segregating votes in the poll book in any manner.

Section 111.670 dealing with counting of votes directs that after all ballots are counted, "the whole number of votes for each person shall be enumerated * * *". Enumerated is defined in Webster's Dictionary simply as "counting". This section in explicit and clear language provides that the whole number of votes for each person shall be enumerated [counted]. This can only be interpreted to mean that all votes cast for a candidate must be counted as the total without regard to political parties. If the Legislature had intended totaling write-in votes as Democratic, Republican or Independent, it could easily have done so. However, there is no statutory authority which would authorize the totaling of write-in votes in such a manner.

In State ex rel. v. Coburn, 168 SW 956, the Missouri Supreme Court held on the question of the validity of write-in votes as follows, l.c. 959:

"* * * He [the voter] does not have to vote for the nominee of the party ticket he chances to use, but can vote for whom he pleases, whether the person of his choice has been nominated or not. * * * when the voter goes to the quietude of his booth to vote, he has the absolute and unqualified right to vote for whom he pleases."

Honorable Thomas O. Pickett

-3-


Thus, a voter is not restricted to the names on the printed ballot. The voter has an absolute and unqualified right to vote for whom he pleases. If a voter writes-in a candidate's name, that vote must be counted and given the same weight as any other vote without regard to the party ticket he chances to use.

CONCLUSION

It is the opinion of this office that write-in votes must be counted and totaled without regard to the party ticket the voter chances to use.

The foregoing opinion which I hereby approve was prepared by my Assistant, Jim DeNeen.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

November 6, 1964

Opinion No. 346
Answered by letter

Honorable Virgil Conkling
Prosecuting Attorney
Wayne County
Greenville, Missouri



Dear Mr. Conkling:

This is in answer to your recent request for an official opinion of this office relating to stenographic and clerical help for a prosecuting attorney in a fourth class county, which reads in part as follows:

"Where the amount equivalent to \$75.00 monthly has been budgeted according to law for the payment of stenographic and clerical help for the prosecuting attorney's office under the captioned statute, has the county court the power to discontinue payment of the same for any portion of the fiscal year for which such sum has been so budgeted, assuming the continued need and employment of such help?"

Section 56.245, RSMo 1961 Cum. Supp., provides that:

"The prosecuting attorney in counties of the third and fourth class may employ such stenographic and clerical help as may be necessary for the efficient operation of his office. The salary of any stenographer or clerk so employed shall be fixed by the prosecuting attorney with the approval of the county court to be paid by the county but such salary shall not exceed twenty-seven hundred dollars per year in third class counties and twelve hundred dollars per year in fourth class counties."

Honorable Virgil Conkling

-2-

Thus, the prosecuting attorney determines what stenographic and clerical help is necessary for the efficient operation of his office.

The salary of such help is fixed by the prosecuting attorney, subject to the "approval" of the county court. Once that approval has been given and budgeted according to law, there being no statutory provision which permits this "approval" to be altered, it is the opinion of this office that the county court does not have the power to discontinue payment of the budgeted amount, assuming, of course, the continued need and employment of such help.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

TEE/dg

INSURANCE: Articles of Incorporation of the Executive Security
Life Insurance Company

OPINION NO. 347

October 12, 1964



Honorable Ralph H. Duggins
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

By letter dated October 6, 1964, you requested an opinion from this office as to whether documents submitted by the Executive Security Life Insurance Company are in accordance with Chapter 376 of the Statutes and are not inconsistent with the constitution and laws of this state and the United States. These documents consisted of an executed copy of the Declaration of Intention of the original incorporators of the Executive Security Life Insurance Company, a copy of the Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959, and the Publisher's Affidavit as to publication of said Articles as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1959, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Yours very truly,

TJD:mje

THOMAS F. EAGLETON
Attorney General

INSURANCE: Articles of Incorporation of the Modern Assurance
Life Insurance Company

OPINION NO. 348

October 12, 1964

Honorable Ralph H. Duggins
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri



Dear Mr. Duggins:

By letter dated October 6, 1964, you requested an opinion from this office as to whether documents submitted by the Modern Assurance Life Insurance Company are in accordance with Chapter 376 of the Statutes and are not inconsistent with the constitution and laws of this state and the United States. These documents consisted of an executed copy of the Declaration of Intention of the original incorporators of the Modern Assurance Life Insurance Company, a copy of the Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959, and the Publisher's Affidavit as to publication of said Articles as required by Section 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with provisions of Chapter 376, RSMo 1959, and not inconsistent with the constitution and laws of this state and the United States.

It should be noted that the Articles of Incorporation, Article III, paragraph (c), refers to Section 275.330, Revised Statutes of Missouri, 1959, as amended. This apparently is a typographical error and it is assumed that Section 375.330, Revised Statutes of Missouri, 1959, as amended, is the statutory reference intended. This error should be brought to the attention of the proposed company.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Yours very truly,

TJD:mje

THOMAS F. EAGLETON
Attorney General

ASSESSORS: The preceding twelve month period for which
COUNTY CLERKS: payments to a county assessor in a third class
COUNTY WARRANTS: county not having township organization under
Section 53.143, RSMo Cum. Supp., 1963, is based
is the preceding twelve-month period beginning September first and
ending August thirty-first. The county treasurer should issue the
warrants for such payments although the county clerk shall perform
all duties relating to the social security contributions in respect
to those payments.

Opinion No. 349

November 9, 1964



Honorable Bob F. Griffin
Prosecuting Attorney
Clinton County
223 East Third Street
Cameron, Missouri

Dear Mr. Griffin:

This is in answer to your recent request for an official
opinion of this office concerning Sections 53.143 and 53.147,
RSMo Cum. Supp., 1963, which reads in part as follows:

"First, are the payments which begin
January 31, 1965, based upon the amount
due the assessor for the preceding 12
month period; thus, requiring a certifi-
cation by the county clerk prior to
January 21, 1965, as to the amount due
the assessor for the preceding 12 month
period?

"Second, this law in Section 2 (1) provides
that the payments due from the county shall
be made by a county warrant issued by the
county treasurer of the assessor's county,
which of course requires something which the
county treasurer has never heretofore done
i.e. issue county warrant. Does this mean
that the county treasurer will now have to
have warrants made up and make these payments
in this manner? Also, does the county clerk
or the county treasurer handle the matter of
withholding taxes and f.i.c.a. taxes in respect
to these payments to the county assessor?"

In answer to the question regarding the particular period
of time referred to, Subsection 1 of Section 53.143, RSMo Cum.
Supp., 1963, reads as follows:

Honorable Bob F. Griffin

"1. Every county assessor in a third class county, except counties having township organization, shall receive his compensation for the twelve month period beginning September first and ending August thirty-first, in the following manner: On the last day of January and on the last day of each of the next consecutive four months he shall receive from the county and from the state, a sum equal to fifteen per cent of the amount due from each of them to the assessor of that county in the preceding twelve month period. As soon as practical thereafter, he shall receive an amount from the county and from the state which, when added to the amounts received in the preceding five payments from each of them, will result in his having received the total compensation due him for the twelve month period."

The phrase, "the preceding twelve month period" which follows the colon, refers to the previously mentioned "twelve month period beginning September first and ending August thirty first". The use of the colon and the phrase "in the following manner:" supports this construction.

Section 53.147, RSMo Cum. Supp., 1963, reads as follows:

"The county clerk of each county of the third class and not having township organization shall, not later than June fifteenth, 1965, and each June fifteenth thereafter, certify to the treasurer of his county and the director of revenue the amount due the assessor of his county for the current twelve month period."

Thus, the first certification is to be rendered not later than June 15, 1965; it is, therefore, not necessary for the county clerk to make his certification prior to January 31, 1965.

As to the question of which officer prepares the warrant, Section 53.145, RSMo Cum. Supp., 1963, is controlling and reads as follows:

"The payments provided for in section 53.143 shall be made in the following manner:

"(1) Each payment due from the county shall be made by county warrant issued by the county treasurer of the assessor's county; and

Honorable Bob F. Griffin

"(2) Each payment due from the state shall be made by a check issued by the state treasurer."

Subdivision 1 of this section specifically provides for the issuance of the county warrant by the county treasurer of the assessor's county. General provisions relating to the issuance of county warrants are found in Section 50.180, RSMo 1959, which reads as follows:

"When the county court shall ascertain any sum of money to be due from the county, as aforesaid, such court shall order its clerk to issue therefor a warrant, specifying in the body thereof on what account the debt was incurred for which the same was issued, and unless otherwise provided by law, in the following form:

"Treasurer of the county of :
Pay to dollars, out
of any money in the treasury appropriated
for ordinary county expenditures (or express
the particular fund, as the case may require).

"Given at the courthouse, this . . . day of
., 19 . . ., by order of the county
court.

"Attest: C D, clerk. A B, president."

Where there is a repugnancy between a general and specific statute, as in this instance, Missouri courts have long followed the established rule of statutory construction that the two laws which relate to the same subject must be read together, and the provisions of one having special application to a particular subject is a qualification of, or exception to the general statute. *Veal v. City of St. Louis*, 289 SW2d 7, 365 Mo. 836.

There being no provisions concerning the manner in which the withholding and social security contributions are to be made, Section 51.165, RSMo 1959, controls. This section reads as follows:

"In all counties of class three and four which shall enter into an agreement with the state agency to place county employees under the Federal Social Security Act in accordance with the provisions of sections 105.300 to 105.450, RSMo, it shall be the duty of the county clerk to keep necessary records, collect contributions of county

Honorable Bob F. Griffin

employees and remit the same to the state agency, and do all other administrative acts required by the agreement or by ruling of the federal or state agency in order to carry out the purposes of the aforesaid law."

Conclusion

Therefore, it is the opinion of this office that (1) the preceding twelve month period for which payments to a county assessor in a third class county not having township organization under Section 53.143, RSMo Cum. Supp., 1963, is based, is the preceding twelve-month period beginning September first and ending August thirty-first, (the amount due for the current twelve-month period being certified by or on June 15th as required by Section 53.147, RSMo Cum. Supp., 1963); and (2) the county treasurer should issue the warrants for such payments although the county clerk shall perform all duties relating to the social security contributions in respect to those payments.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas E. Eichhorst.

Very truly yours,



THOMAS F. EAGLETON
Attorney General

COUNTY SUPERINTENDENT:
OFFICERS:
COMPATIBILITY OF OFFICES:
TEACHERS:

1. The capacities of county superintendent and public teacher are incompatible.
2. If a county superintendent accepts employment as a public school teacher he ipso facto vacates his office as county superintendent.
3. If the office of county superintendent is vacated by acceptance of a second incompatible position, the county superintendent's right to compensation ceases and also the county court does not have authority to employ clerical assistance for the county superintendent's office.

December 30, 1964

OPINION No. 350

Honorable Marvin L. Dinger
Prosecuting Attorney
Iron County
Ironton, Missouri



Dear Mr. Dinger:

This official opinion is issued upon your recent request. You inquire:

"1. Does the performance of teaching by a County Superintendent of Schools constitute abandonment of his job as County Superintendent of Schools, merely a suspension of the job of Superintendent of Schools for the period of the teaching employment or have no effect on his job as County Superintendent of Schools?

"2. What, if any, effect does the performance of teaching by the County Superintendent of Schools have on the County Court to pay the County Superintendent of Schools, both for his work and for secretarial help?"

I.

Generally one person may hold several public offices simultaneously unless prohibited by statute or constitution, or by the common-law rule against simultaneous holding of incompatible offices. It is our conclusion that county superintendents are prohibited by both statute and common law from simultaneously serving as public school teachers.

Section 167.100, RSMo 1959, provides:

Honorable Marvin L. Dinger

"During his term of office the county superintendent shall not engage in teaching or in any other employment that interferes with the duties of his office as prescribed by law. * * * "

If there should be any doubt as to Section 167.100 flatly prohibiting a county superintendent to simultaneously engage in teaching, we will further consider the question of common law incompatibility.

At common law, offices are held to be incompatible when (a) one is subordinate to the other, (b) one has supervisory power over the other, (c) one has power of appointment or power of removal over the other, or (d) one audits the other's accounts. 67 C.J.S., Officers § 23, p. 135; State v. Wittmer, Mont., 144 Pac. 648, 649; Opinion 167 issued April 19, 1963, to Daniel V. O'Brien (copy enclosed).

The duties of a county superintendent are defined by our statutes. He has the power to assign students from one school to another more accessible (Section 161.093 RSMo 1963 Cum. Supp). If a county superintendent were an employee of a school district affected by an assignment, his interests in making the assignment could be in conflict. The county superintendent is also secretary of the county board of education (Section 165.660 RSMo). He has the power to participate in the arbitration of boundary disputes and select other arbitrators (Section 165.170 and 165.294). He has the power to fill vacancies on school boards (Sections 165.217 and 165.317). He may cast a tie-breaking ballot at the request of three members of a school board (Section 165.320).

Other examples can be cited but the above should sufficiently demonstrate that the capacities of county superintendent and public school teacher are not compatible.

We are aware that in some counties of our state some or even all of the school districts may not be under the supervision of the county superintendent in every respect. In certain districts he has been relieved of the duty to supervise transportation (Section 167.050) and the duty to assist in the preparation of budgets (Section 167.130 et seq.). However, the fact that a county superintendent might seek employment as a teacher of a school district where some of his duties have been transferred to others, does not change our conclusion, because every county superintendent has certain duties which apply to every school district regardless of its form of organization. Examples of these duties were mentioned above.

Although no case of this nature has been presented to the courts of Missouri, courts of other states have held these two capacities

Honorable Marvin L. Dinger

incompatible. Knuckles v. Board of Education of Bell Co., Ky., 114 S.W.2d 511; Richardson v. Bell County Board., Ky., 177 S.W. 2d 871.

Therefore, both by statute and common-law standards a county superintendent cannot simultaneously be a public school teacher.

II.

The effect upon the first office of acceptance of a second incompatible office has been clearly enunciated by the Supreme Court of Missouri.

"The rule at common law is well settled that where one, while occupying a public office, accepts another, which is incompatible with it, the first will ipso facto terminate without judicial proceeding or any other act of the incumbent. The acceptance of the second office operates as a resignation of the first. * * * Where the holding of two offices by the same person, at the same time, is forbidden by the constitution or a statute, the effect is the same as in case of holding incompatible offices at common law. In such case the illegality of holding the two offices is declared by positive law, and incompatibility in fact is not essential. In each case the holding of two offices is illegal, it is made so in one case by the policy of the law, and in the other by absolute law. In either case the law presumes the officer did not intend to commit the unlawful act of holding both offices, and a surrender of the first is implied. * * * " State ex rel. Walker v. Bus, Mo., 36 S.W. 636, 637.

Therefore, if a county superintendent accepts employment as a public school teacher he ipso facto vacates his office as county superintendent.

III.

As to your second inquiry: Since a county superintendent is compensated as an incident of his office and for the performance of official duties, it follows that his right to compensation terminates when he vacates his office and ceases to have official duties. State ex rel. Owens v. Draper, 45 Mo. 355.

As to the payment of clerical hire when the office of county superintendent is vacant, note Opinion No. 21 of this office issued

Honorable Marvin L. Dinger

October 23, 1959 to Bill Davenport. A copy is enclosed. There, this office ruled that when the office of county superintendent is vacant the county court does not have authority to employ clerical assistance to the county superintendent.

CONCLUSION

Therefore, it is the opinion of this office that:

1. The capacities of county superintendent and public school teacher are incompatible.
2. If a county superintendent accepts employment as a public school teacher he ipso facto vacates his office as county superintendent.
3. If the office of county superintendent is vacated by acceptance of a second incompatible position, the county superintendent's right to compensation ceases and also the county court does not have authority to employ clerical assistance for the county superintendent's office.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Louis C. DeFeo, Jr.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

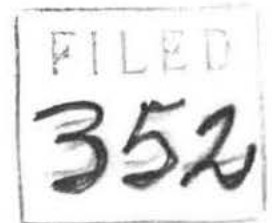
Enclosures

OFFICERS: Retirement is compulsory for all employees
PUBLIC OFFICERS: of the State Board of Barber Examiners at
RETIREMENT: the age of 65 years, except that (1) any
STATE EMPLOYEES: employee, upon written request, with the
written approval of the President of said
barber board filed with the Retirement
Board in advance of the retirement date,
may be retained for successive periods of
one year until age 70; and except that (2)
any person with professional, scientific
or technical skills who is so certified to
the trustees of the retirement system by
his department head and such certification
approved by the Retirement Board, shall
not be precluded employment or continued
employment at any age. The Governor may
appoint any person to the State Board of
Barber Examiners who meets the requirements
of Section 328.030, RSMo, regardless of age.

Opinion No. 352

October 23, 1964

Mr. Leon F. Burton
Secretary-Treasurer
State Board of Barber Examiners
131 Capitol Building
Jefferson City, Missouri



Dear Mr. Burton:

You have requested an official opinion of this office
construing the Missouri State Employees' Retirement System Law,
Chapter 104, RSMo, as it bears upon the following questions:

- (1) May the State Board of Barber Examiners retain in
its employment an inspector after he has reached the age of
70 years;
- (2) May the Barber Board employ anyone over the age of
65 years;
- (3) May the Barber Board employ anyone over the age of
70 years;
- (4) May the Governor appoint a member of the State Board
of Barber Examiners who has reached the age of 70 years.

Section 104.330, RSMo, makes all employees of the State
of Missouri members of the State Employees' Retirement System.
Section 104.310 provides that the normal retirement age is 65
years for all members.

Your questions are governed by Section 104.380, RSMo, which reads as follows:

"1. Each member shall retire at the end of the month during which such member shall reach normal retirement age with a normal annuity, except that

"(1) Any employee, upon written request, with the written approval of his department head filed with the board in advance of the retirement date, may be retained for successive periods of one year until age seventy, when retirement shall be compulsory;

"(2) Any person in any age category with professional, scientific or technical skills, who is so certified to the board of trustees by his department head, and such certification is approved by the board, shall not be precluded employment or continued employment; and

"(3) No member of the general assembly, and no elected official or other official appointed by the governor, or appointed for a fixed term, shall retire; regardless of his age, unless such retirement is otherwise provided for by law, until his term of office has been completed. Any member of the general assembly and any elected official or other official appointed by the governor or appointed for a fixed term who reaches normal retirement age during his term of office shall receive his annuity commencing with the end of the first month after the month during which he has completed his term of office.

"2. If a retired member is elected to any state office or is appointed to any state office he shall not receive an annuity for any month or part of a month for which he serves as an officer, but he shall receive an annuity calculated to include his additional creditable service commencing with the end of the first month after the month during which his term of office has been completed.

"3. Any member who has reached normal retirement age and has retired may elect, in writing, to have his accumulated contributions paid to him in one lump sum in lieu of the payment of his normal annuity.

"4. Except as otherwise provided in this section, a retired member shall not continue in, be reemployed by, or perform any service for a department, for which employment or service a compensation or remuneration is paid to the retired member."

Under subsection one, retirement is compulsory at age 65, with three exceptions. The first exception comprises employees who upon written request, with the written approval of his department head filed with the Retirement Board in advance of the retirement date, may be retained for successive periods of one year until age of 70, when retirement will be compulsory.

The second exception exempts from retirement by reason of age persons with professional, scientific or technical skills, so certified to the board of trustees of the retirement system by the department heads involved where such certification is approved by the Retirement Board.

The third exception applies to members of the general assembly, elected officials, and officials appointed by the Governor or appointed for a fixed term. No such person shall be retired by reason of age until his term of office has been completed.

Subsection two makes it clear that one who has reached the retirement age may be elected to state office or may be appointed to a state office.

As applied to your inquiries, the above provisions mean that the State Board of Barber Examiners are allowed to retain in its employment one who has reached the age of 65 years by complying with subparagraph (1) of subsection one, Section 104.380; that is, if the employee requests it in writing and if the President of the Barber Board approves the request in writing and files such approval with the Retirement Board prior to the end of the month during which the employee reaches the age of 65 years, he may be retained for successive periods of one year until the age of 70 when the retirement shall be compulsory. Also, an employee may be retained beyond age 70 if he is a person with professional, scientific, or technical skills and is so certified by his department head and such certification approved by the Board of Trustees of the Missouri State Employees' Retirement System.

The Barber Board may not newly employ anyone who is over 65 years of age, unless he falls into the category of persons with professional, scientific or technical skills so certified to the Board of Trustees of the retirement system by the President of the Barber Board, with the approval of the Retirement Board.

Mr. Leon F. Burton

-4-

The Governor may appoint anyone to the State Board of Barber Examiners who meets the requirements of Section 328.030, RSMo, regardless of the age of the appointee.

CONCLUSION

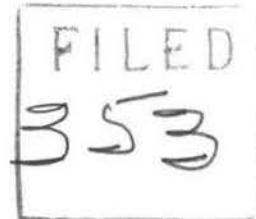
It is the opinion of this office that retirement is compulsory for all employees of the State Board of Barber Examiners at the age of 65 years, except that (1) any employee, upon written request, with the written approval of the President of said Barber Board filed with the Retirement Board in advance of the retirement date, may be retained for successive periods of one year until age 70; and except that (2) any person with professional, scientific or technical skills who is so certified to the trustees of the retirement system by his department head and such certification approved by the Retirement Board, shall not be precluded employment or continued employment at any age. The Governor may appoint any person to the State Board of Barber Examiners who meets the requirements of Section 328.030, RSMo, regardless of age.

The foregoing opinion, which I approve, was prepared by my Assistant, Donald L. Randolph.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

October 16, 1964



Honorable Lawrence A. Schneider
Advisor to the Commission
Division of Commerce and
Industrial Development
Eighth Floor, Jefferson Building
Jefferson City, Missouri 65102

Dear Mr. Schneider:

This is in answer to your recent letter in which you ask whether a valid contract may be entered into between a municipality and a private corporation for sale of an industrial development project purchased or constructed by such municipality from the proceeds of the sale of general obligation bonds issued under the provisions of the Industrial Development Act of Missouri, Section 71.791 to 71.850, RSMo, Cum. Supp., 1963.

Section 71.850, Cum. Supp. 1963, gives specific authority for a municipality to sell the property, buildings or plants acquired from the proceeds of general obligation bonds to private persons or corporations for manufacturing or industrial development purchases upon approval by the Division of Commerce and Industrial Development. Such section provides as follows:

"Property acquired may be sold.--
Any municipality may sell or otherwise dispose of the property, or buildings or plants acquired with the proceeds from the sale of general

Honorable Lawrence A. Schneider

obligation bonds issued under sections 71.790 to 71.850, to private persons or corporations for manufacturing or industrial development purposes upon approval by the division of commerce and industrial development. The terms and method of the sale or other disposal shall be established by the division so as to reasonably protect and promote the economic well-being and the industrial development of the municipality."

In the case of State ex rel. City of El Dorado Springs v. Holman, 363 S.W. 2d 552, the Supreme Court of Missouri in speaking of plants acquired by a municipality under the provisions of Section 23a of Article VI of the Constitution of Missouri, which provides that certain cities, towns and villages when authorized by law may be indebted for and purchase or construct plants to be used by private persons or corporations for industrial development purposes said, l.c. 559:

" * * * Those financed by general obligation bonds under § 23(a) are clearly made subject to being 'leased or otherwise disposed of pursuant to law, * * *'"

The court in such case in discussing Section 19 of H.C.S.H.B.'s 41 and 370 of the 71st General Assembly (Laws of Missouri, 1961, p. 189, Section 71.850, Cum. Supp. 1961), which provided for sale of property, buildings or plants constructed from the proceeds of the sale of general obligation bonds and revenue bonds said, l.c. 559:

"One of the several attacks upon the constitutional validity of the enabling act is directed against what is now § 71.850, which provides as follows:
'Any municipality may sell or otherwise dispose of the property, or buildings or plants acquired under sections 71.790 to 71.850 upon approval by the

Honorable Lawrence A. Schneider

division of commerce and industrial development. The terms and method of the sale or other disposal shall be established by the division.'

"It is charged that this section of the statute is 'invalid, unconstitutional and void because such section provides for "sale" of plants while the Constitution provides only for leasing or other disposition similar to leasing.' We have just noted that § 23(a), Article VI--the section here directly involved--provides that industrial development properties may be 'leased or otherwise disposed of pursuant to law.' This language clearly comprehends and sanctions a sale (being a disposition otherwise than by leasing) if and when made 'pursuant to law.' * * *"

Section 71.850, Cum. Supp. 1961, ruled on by the court in the Holman case was amended by House Bill No. 94, 72nd General Assembly, and as pointed out above, now provides that only plants acquired from the proceeds of the sale of general obligation bonds may be sold by the municipality and may be sold only for manufacturing or industrial development purposes. However, the ruling of the Supreme Court in such case is a direct holding that plants acquired from the proceeds of the sale of general obligation bonds may be sold by a municipality to private persons or corporations for manufacturing or industrial development purposes when the terms and method of the sale is approved by the Division of Commerce and Industrial Development.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CBB/fh

ELECTIONS:
ABSENTEE BALLOTS:
VOTING:
NOTARY PUBLIC:

1. When absentee ballots are sent by mail, they must be directed to the voter and sent by Certified Mail with return receipt and addressed to the voter at the place where he is actually residing.
2. Absentee ballots must be voted in the presence of the notary public or other officer and deposited and sealed in the envelope and the notary must place his signature and title on the envelope.

OPINION NO. 356

December 7, 1964

Honorable Frank C. Ellis
State Representative
Bollinger County
Sedgewickville, Missouri



Dear Mr. Ellis:

This is in response to your request dated October 14, 1964, for an opinion relating to absentee voting. Your first question is stated in the following language:

"In Bollinger County they are mailing out ballots in care of individuals who live in some other state or city. There has been as high as five ballots mailed to one person to sign for the Registered Ballots through mail. Can a person receive more than one ballot through mail even if they are for someone else?"

Your question relates to the procedure which should be used by county clerks and boards of election commissioners in mailing absentee ballots to voters. Section 112.030, RSMo Cum. Supp. 1963, contains the following language relating to this particular subject:

"* * * and if the applicant for ballot * * * is entitled to receive same, the county clerk or the board of election commissioners * * * immediately * * * shall send in a separate envelope addressed to each absentee voter and by certified mail with return receipt or deliver in person an official ballot * * * to any applicant applying in person at the office of the county clerk or the board of election commissioners. * * *"

This statute makes it clear that only one of two alternative methods may be used by the county clerk or board of election commissioners to deliver absentee ballots to a voter.

The first alternative is by mail; the second alternative is delivery in person to the voter in the office of the county clerk.

This language shows a clear intent by the Legislature to see that absentee ballots are delivered directly to the voter at the place where the voter either permanently or temporarily resides. This, we believe, would not prohibit the mailing of ballots "in care of" another in some limited circumstances. For example, if the voter were residing in a hotel, hospital, nursing home, or some other similar institution, or were living either temporarily or permanently with a friend or relative, then we think it would be appropriate to send the ballot "in care of" such institution, friend, or relative.

It has been brought to our attention, however, that some County Clerks have been requested to send absentee ballots "in care of" a political headquarters, or "in care of" a candidate, or "in care of" an individual (e.g. a campaign manager) who is active in a political campaign. This we deem contrary to the intent of the Legislature.

County Clerks and Boards of Election Commissioners should exercise reasonable diligence and caution to mail absentee ballots directly to the voter and by certified mail with return receipt. The ballot should be addressed to the absentee voter at the place where he is either temporarily or permanently residing. It should not be sent to another person who will be called upon to deliver the ballot to the absentee voter and thus make such intermediary an agent for the purpose of delivering the ballot to the voter. (This does not mean that officials or employees of an institution or relatives or friends of the voter at the place where the voter actually is residing may not sign the postal return receipt.)

The use of absentee ballots has always been a source of irritation and dispute. We believe that it was the intent of the Legislature to minimize the possibility of fraud. To do this, every effort should be made to see that the absentee ballot when delivered by mail goes as directly as possible to the voter.

Your second question is stated in the following language:

"I would also like to know if it is legal for a -- candidate to have a person to vote a ballot and then take it and have the ballot notarized later?"

Your question, as we understand it, is whether an absentee ballot is valid if it is not marked and sworn to in the presence of the notary public or other officer authorized by law to administer an oath.

Section 112.050, RSMo 1959, provides as follows:

"The absent voter shall make and subscribe to the affidavits provided for on the return envelope for the ballot before any officer authorized by law to administer oaths; and the voter shall exhibit the ballot to the officer unmarked, and shall thereupon in the presence of the officer and of no other person mark the ballot or ballots, but in such manner that the officer cannot see or know how it is marked. The ballot or ballots shall then in the presence of the officer be deposited in the envelope and the envelope securely sealed. The officer shall then write or print upon the envelope the following: 'Absentee ballot of (insert name of voter) marked and sealed in my presence', which certificate shall be signed by the officer and his official title noted thereon, * * *."

The foregoing statute plainly requires that the voter must mark the ballot in the presence of the notary public or other officer, and, then the ballot must be deposited in the envelope provided therefor and the envelope must be sealed and the notary public or officer must certify that the ballot was marked and sealed in his presence and the notary's or other officer's signature and official title must be written on the envelope.

Unless this statute is strictly complied with the affidavit is void and the ballot is likewise void. The Supreme Court of Missouri in Elliott v. Hogan, 315 SW2d 840, held that absentee voting statutes are mandatory and irregularities in absentee ballots render them illegal.

Therefore, the absentee ballot must be marked in the presence of the notary and the ballot must be put in the envelope in the presence of the notary and the envelope sealed.

The notary must then write on the envelope: "Absentee ballot of (insert name of voter) marked and sealed in my presence". Thereafter, the notary must sign his name and his official title on the envelope at the places provided therefor.


CONCLUSION

(1) It is the opinion of this office that when absentee ballots are sent by mail they must be directed to the voter and sent by certified mail with return receipt and addressed to the voter at the place where he is actually residing either temporarily or permanently.

(2) Absentee ballots must be voted in the presence of the notary public or other officer and deposited and sealed in the envelope provided therefor and the notary public must place his signature and official title on the envelope at the places provided therefor.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, J. Gordon Siddens.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

DIVISION OF FINANCE:
BANKS:

Articles of Incorporation of Scott
City Bank and Trust Company.

OPINION NO. 357

October 16, 1964



Mr. Robert B. Mackey
Commissioner of Finance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Mackey:

By your letter of September 4, 1964, you request an advisory opinion from this office as to whether proposed Articles of Incorporation of the Scott City Bank and Trust Company are in accordance with Chapter 363, RSMo 1959, as amended and are not inconsistent with the Constitution and laws of this state and the United States. It is my understanding that the Scott City Bank and Trust Company proposes to change from a state bank to a trust company in conformance with Section 363.140. An examination of the Articles of Incorporation has been made and it is the opinion of this office that the same are found to be in accordance with the provisions of Chapter 363, RSMo 1959, particularly Sections 363.030 and 363.140 and are not inconsistent with the Constitution and laws of this state and the United States. However, the title of the instrument should be changed from Articles of Incorporation to Articles of Agreement as provided by the statutes.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JHD:kd/lt

FOREIGN COUNTRIES:
FORFEITURES:
ALIENS:
REAL ESTATE:

Section 442.580, RSMo 1959, does not prohibit a foreign government from acquiring, holding, or owning real estate in the State of Missouri.

OPINION NO. 359

November 18, 1964

Honorable John M. Dalton
Governor, State of Missouri
Executive Office
Jefferson City, Missouri



Dear Governor Dalton:

This opinion is being rendered in response to the request in your letter of October 9, 1964. The question involved is contained in the letter to you dated October 6, 1964, from Mr. J. Edward Lyerly, Deputy Legal Adviser, Department of State, which reads:

"There is enclosed a copy of a note from the Embassy of Belgium concerning the desire of that Government to purchase property in Kansas City, Missouri, for use as the residence of the Belgian Consul General.

"The Embassy requests the advice of the Department regarding the right of the Belgian Government to purchase property in Missouri for the purpose stated. The Embassy states that it is aware that Section 442.580 of the Missouri statutes prohibits aliens from acquiring and holding real estate in Missouri except as provided by treaty, but that it is under the impression that this statute does not apply to foreign governments.

"It would be appreciated if you would furnish the Department information on which to base its reply to the question raised by the Embassy. For your information, there is not in force between the United States and Belgium any treaty containing provisions relating to the acquisition of land in the United States by the Belgian Government, or by the United States in Belgium. It may be of interest that the Belgian Embassy recently inquired of the Department concerning

the right of the Belgian Government to purchase a residence for its Consul General at Chicago, Illinois, in view of the prohibition in Illinois law against the acquisition by aliens of real estate in Illinois. (Ill. Rev. Stat. 1959, chap. 6, paras. 1 and 2.) The Department replied that in a letter to the Secretary of State dated April 13, 1960, the Attorney General of Illinois stated there was no prohibition in Illinois law against a foreign nation acquiring or holding title to real estate situated in that State, and that the Aliens Act appertained to individuals or persons, not to foreign states or countries."

Section 442.580, RSMo 1959, is entitled:

"Unlawful for aliens or corporations of foreign countries to acquire or own real estate, when".

This section provides:

"It shall be unlawful for any person or persons not citizens of the United States, or who have not lawfully declared their intention to become such citizens, or for any corporation not created by or under the laws of the United States or of some state or territory of the United States, to hereafter acquire, hold or own real estate so hereafter acquired, or any interest therein, in this state, except such as may be acquired by inheritance or in good faith in the ordinary course of justice in the collection of debts; provided, that the prohibition of this section shall not apply to cases in which the right to hold or dispose of lands in the United States is secured by existing treaties to the citizens or subjects of foreign countries, which rights, so far as they may exist by force of any such treaty, shall continue to exist so long as such treaties are in force, and no longer."

It should be noted that this section, when referring to those coming within its prohibitions, uses the words "aliens, corporations, person or persons not citizens of the United States,

citizens and subjects of foreign countries." Nowhere does the statute expressly or by implication include a foreign country or a foreign state within its prohibitions.

In 3 C.J.S., Section 1, page 523, an alien is defined as:

" . . . a person who owes allegiance to a foreign government or who does not owe allegiance to the government whose relationship to such person is in question."

In 20 C.J.S., page 1299, foreign country is defined as:

"A country exclusively within the sovereignty of a foreign nation, and without the sovereignty of the United States."

Further, in 48 C.J.S., Section 4, page 3, it is stated that:

"A [foreign] state is a sovereign political unity; a body politic possessing sovereignty."

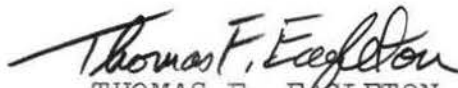
The distinction between the sovereign foreign country and the citizen of the foreign country is readily apparent. We see no reason to believe that the Missouri Legislature was not aware of the distinction when Section 442.580 was enacted. When the Missouri Legislature spoke of "aliens, corporations, person or persons not citizens of the United States, citizens and subjects of foreign countries," there is no reason to doubt that it meant the prohibitions of Section 442.580 to apply to foreign citizens alone and not to foreign sovereign countries. The words such as alien, person, and citizen could be given effect to include a foreign country only by straining them beyond their natural meaning and contrary to the indications of the context of the statute.

CONCLUSION

It is, therefore, the opinion of this office that Section 442.580, RSMo 1959, does not prohibit a foreign government from acquiring, holding, or owning real estate in the State of Missouri.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary A. Tatlow.

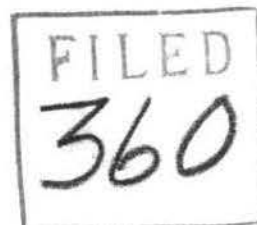
Yours very truly,


THOMAS F. EAGLETON
Attorney General

PUBLIC OFFICERS:	Person elected to nonpartisan Circuit Judicial
OFFICERS:	Commission residing within such district at the
NONPARTISAN COURT PLAN:	time of election who later removes his residence
JUDICIAL COMMISSIONS:	to a place not within such district is not
CONSTITUTIONAL LAW:	qualified to continue as a member of such Circuit
RESIDENCE:	Judicial Commission.
DOMICILE:	

OPINION NO. 360

November 25, 1964



Honorable Edward M. Ruddy, Chairman
22nd Circuit Judicial Commission
Civil Courts Building
St. Louis, Missouri

Dear Judge Ruddy:

This opinion is being rendered pursuant to your request
for an official opinion of this office as follows:

"The 22nd Circuit Judicial Commission established and organized pursuant to the provisions of Article V, Section 29 (a)-(g) and Supreme Court Rule 10 desires your opinion as the Chief Legal Officer of this State on the following matter which is now confronting the Commission.

"Charles A. Mogab, a lawyer elected member of the Commission, was so elected by the members of the Bar of this State residing in the 22nd Judicial Circuit in November 1961 and took office January 1, 1962. At the time of his election he was a resident of the 22nd Judicial Circuit living with his wife and children at 6415 Devonshire Avenue. We understand that he registered as a voter from this address.

"Recently he purchased a home on Spoele Lane in St. Louis County which is outside the boundaries of the 22nd Judicial Circuit. We understand that he is living there with his wife and children and that he and his wife are not separated or living apart. We further understand that they intend to live there indefinitely and that he and his wife and children have abandoned and severed all connections with his former home at 6415 Devonshire Avenue.

"We are further informed by Mr. Mogab that he is now registered as a voter from 3716 Delor Street in the 22nd Judicial Circuit which we have been advised by him is the home of his brother.

"The question of his right to continue as a member of the 22nd Circuit Judicial Commission because of the above change in the matter of his home as outlined has been raised by some of the members of the Commission.

"Mr. Mogab contends that he is still a resident of the 22nd Judicial Circuit and makes the alternative contention that if it is found that he does not reside in the 22nd Judicial Circuit that, nevertheless, he is entitled to continue as a member of the Commission giving as his reason that having possessed all of the necessary qualifications at the time of his election to the Commission he is entitled to serve as a member of the Commission until his term expires on December 31, 1967.

"He has agreed to supply a written statement of facts concerning his contention and his position. Just as soon as this is received it will be forwarded to your office to be considered by you as a part of this letter and as if incorporated herein. We ask your opinions on the following questions:

- "(1) Whether or not Mr. Mogab, under his present circumstances is now residing in the 22nd Judicial Circuit?
- "(2) If it is found that he is not residing in the 22nd Judicial Circuit then whether or not he is entitled to continue as a member of the 22nd Circuit Judicial Commission."

The facts in this matter have been difficult to obtain, in that certain questions propounded by this office to Mr. Mogab in an endeavor to clarify his statement of facts have not been answered as of the writing of this opinion. Therefore, we will of necessity have to make certain basic additional factual

assumptions, and where we do so, we will underline same so as to distinguish them from relevant facts supplied by Mr. Mogab. All of these factual assumptions are consistent with the facts as stated by him.

THE FACTS

Charles A. Mogab is a practicing member of the Missouri Bar with offices in the City of St. Louis. Since November, 1960, he has served as a lawyer-member of the 22nd Judicial Circuit Commission. From 1953 until June 2, 1964, he lived with his wife and daughters at 6415 Devonshire, City of St. Louis.

On June 2, 1964, he purchased a home in St. Louis County (15 Spode Lane) and moved with his family to that address. Having sold his home in the City, he transferred his voting registration from 6415 Devonshire to his brother's house at 3716 Delor, City of St. Louis.

Mr. Mogab stays at his Delor address a small part of the time. However, he still lives with his wife and children and spends the major portion of his non-working hours with his family at the residence in St. Louis County.

Mr. Mogab states that he "intends" to maintain his "actual and legal" residence in the City of St. Louis, but this residence is technical in nature and his actual residence for the purposes of day-to-day living is in St. Louis County.

THE LAW

Section 29 (d), Article V, Constitution of Missouri, 1945, which deals with the number, qualification, selection, and terms of members of nonpartisan judicial commissions provides in part:

"Non-partisan judicial commissions whose duty it shall be to nominate and submit to the governor names of persons for appointment as provided by sections 29 (a)-(g) are hereby established and shall be organized on the following basis: for vacancies in the office of judge of the supreme court or of any court of appeals, there shall be one such commission, to be known as 'The Appellate Judicial Commission'; for vacancies in the office of judge of any other court of record subject to the provisions of sections 29 (a)-(g), there shall be one such commission,

to be known as 'The Circuit Judicial Commission,' for each judicial circuit which shall be subject to the provisions of sections 29 (a)-(g) * * *. * * * each circuit judicial commission shall consist of five members, one of whom shall be the presiding judge of the court of appeals of the district within which the judicial circuit of such commission or the major portion of the population of said circuit is situated, who shall act as chairman, and the remaining four members shall be chosen in the following manner. The members of the bar of this state residing in the judicial circuit of such commission shall elect two of their number to serve as members of said commission, and the governor shall appoint two citizens, not members of the bar, from among the residents of said judicial circuit, to serve as members of said commission; the terms of office of the members of such commission shall be fixed by the supreme court and may be changed from time to time, but not so as to shorten or lengthen the term of any member then in office."
[Emphasis ours.]

It is seen that the two elected members of each Circuit Judicial Commission must reside in the judicial circuit of such commission in order to qualify. We shall now consider what the residence requirement in the above constitutional provision means.

In construing statutes, a basic rule of construction (incorporated in Section 1.090, RSMo) is to give words and phrases (other than technical ones) their plain, ordinary and usual meaning with a view to promoting the apparent objective of the law-makers. And this rule is equally applicable to construction of constitutional provisions. *Rathjen v. Reorganized School District R-II*, 365 Mo. 518, 284 S.W. 2d 516. Technical words are those pertaining to useful or mechanical arts, or any science, business, profession, sport, or the like.

"Residence" may mean something more than domicile, *Rummel v. Peters*, 51 N.E. 2d 57, 314 Mass. 504, and in this constitutional provision, we feel that it does mean more than technical domicile. The language employed can mean only that those members of the bar who actually and in good faith live and maintain their homes in the judicial circuit shall constitute the electorate to select

two of their number -- that is, two of those who in truth and in fact reside therein -- to serve on the commission. Such is the plain, ordinary and usual understanding of the word. A man's residence is where he dwells and is ordinarily the place where his wife and children reside. *D'Elia and Marks Co. v. Lyon*, D.C. Mun. App., 31 A 2d 647, 648; *Fink v. Katz*, D.C. Mun. App., 68 A 2d 813, 815.

This constitutional provision provides that:

"... the members of the bar of this state residing in the judicial circuit of such commission shall elect two of their number * * *"

Why did the provision not merely require the members of the bar of this state practicing or having offices in the judicial circuit of such commission elect two of their number? Irrespective of the reason, a choice was made here and the constitutional provision makes the requirement that members residing in the district elect one of themselves to the circuit judicial commission.

Section 1.020, RSMo, provides:

"As used in the statutory laws of this state, unless otherwise specially provided or unless plainly repugnant to the intent of the legislature or to the context thereof:

* * * * *

"(9) 'Place of residence' means the place where the family of any person permanently resides in this state, and the place where any person having no family generally lodges; * * *."

This provision, strictly speaking, would not apply to construction of the constitution; however, it is worthy to note that when Article V, Section 29 (d), was adopted, the above rule of statutory construction was in effect. It follows that the term "residing in" would have been given further attention if it were intended to have a meaning different from the usual construction.

We are, therefore, of the opinion that under the factual situation set out above, Mr. Mogab is no longer a resident of the 22nd Judicial Circuit.

However, even if we accept the concept of "residence" being the equivalent of "domicile," the above stated facts fail to demonstrate that Mr. Mogab is still "domiciled" in the 22nd Judicial Circuit.

The concept of domicile has been before the courts of Missouri in innumerable cases. We here set out excerpts and principles of law from a few of the cases which we believe to be pertinent to the present situation.

Two fundamental elements are essential to constitute domicile or residence: (1) Bodily presence in a place; (2) The intent of remaining in that place permanently or for an indefinite time. *Phelps v. Phelps*, 246 S.W. 2d 838; *Barth v. Barth*, 354 Mo. App. 402, 189 S.W. 2d 451; *In Re Lankford's Estate*, 272 Mo. 1, 197 S.W. 147; *In Re Ozias' Estate*, 29 S.W. 2d 240; *Schneider v. Friend*, Mo. App., 361 S.W. 2d 308, 311. While bodily presence is one of the elements of residence or domicile, the length of time of bodily presence, however short, is of no consequence (*Nolker v. Nolker*, 257 S.W. 798), provided the concurring intent is established by other evidence. In *Barth v. Barth*, supra, 189 S.W. 2d, 1.c. 454, the St. Louis Court of Appeals held:

"To create a residence in a particular place two fundamental elements are essential. These are actual bodily presence in the place, combined with a freely exercised intention of remaining there permanently, or for an indefinite time. Whenever these two elements combine a residence is created. Neither bodily presence alone nor intention alone will suffice to create a residence. Both must concur, and at the very moment they do concur a residence is created. The length of the period of bodily presence, however short, is of no consequence, provided the concurring intention is established by other evidence. Otherwise it may become an important fact for consideration in determining the existence or not of the intention."

In most cases the requirement of bodily presence is not too difficult to determine. The usual difficulty is determining whether the necessary intent is present. The intent of the individual whose residence is in question is to be deduced from all the surrounding circumstances, acts, and utterances of such person.

"Residence is largely a matter of intention."
[Citations omitted.]

"This intention is to be deduced from the acts and utterances of the person whose residence is in issue." In Re Lankford's Estate, supra, pages 148, 149.

As stated by the Kansas City Court of Appeals in the case of In Re Ozias' Estate, supra, page 243, when considering the problem of residence:

"The ruling herein depends upon the proper construction of the word domicile. Our Supreme Court held in Re Estate of Lankford, 272 Mo. 1, 197 S.W. 147, that residence is largely a matter of intention, to be deduced from the acts of a person. Residence and domicile are used interchangeably, and, in so far as they apply to the situation here presented are synonymous.

"'Domicil. That place where a man has his true, fixed and permanent home and principal establishment, and to which whenever he is absent he has the intention of returning.'

"Bouv. Law Dict., Vol. 1, page 915. * * *"

If a discrepancy exists between the declarations of intent of the individual whose residence is in question and the conduct of the individual, the conduct is deemed to show the true intent and the declarations yield to the inference derived from such conduct. Barrett v. Parks, Mo., 180 S.W. 2d 665, 666.

See also State ex inf. McKittrick ex rel. Chambers v. Jones, 185 S.W. 2d 17, 353 Mo. 900; In Re Toler's Estate, 325 S.W. 2d 755.

Section 1.020, RSMo 1959 (above quoted) illustrates the importance of the place of residence of the family of the person whose domicile or residence is in question. The removal of one's family is a very important indication of intent in determining whether there has been a change of residence, McDowell v. Friedman Brothers Shoe Company, 115 S.W. 1028, 135 Mo. App. 276. There are numerous Missouri decisions which have considered the place

where the family of a married man lives, when such married man is not estranged from his family, as being of vital importance in determining such a man's residence. See State ex rel. Ramey v. Dayton, 77 Mo. 678; State v. Snyder, 182 Mo. 462, 82 S.W. 12.

There are, of course, exceptional situations such as in Barrett v. Parks, 180 S.W. 2d 665. There, Mr. Parks was required by his employer, the City, to live at the airport in St. Louis County for the more efficient discharge of the municipality's public purposes and necessities, and for that reason alone, he and his family lived at the municipally owned residence provided by the city. Such residence by Parks was clearly temporary in nature and did not negative nor was it inconsistent with his continued intention to retain his municipal citizenship (which was a charter-prescribed condition of employment). No comparable necessitous situation exists as to Mr. Mogab.

Proof of maintenance of a home and family in St. Louis County in which Mr. Mogab spends the major portion of his non-working hours is very persuasive in showing that he resides in St. Louis County under the above quoted authorities, and, considered in the light of all the facts, leads this office to the opinion that Mr. Mogab is no longer a resident or domiciliary of the 22nd Judicial Circuit.

The fact that Mr. Mogab stays at the Delor address of his brother a small part of the time, apparently for reasons of convenience, does not negative the basic fact that his actual home is in St. Louis County. In our opinion, Mr. Mogab resides in St. Louis County where he actually lives and where he maintains a home for and with his family.

Your next question is whether as the result of his change of residence, Mr. Mogab is entitled to continue as a member of the 22nd Judicial Circuit Commission. In our opinion, he is not.

The determination of this question involves a construction of the constitutional provision and a determination of its intent and purpose. Under the provisions of Article V, Section 29 (d), a Circuit Judicial Commission consists of five members, two of whom are elected by the members of the bar residing in the Judicial Circuit, two of whom are appointed by the Governor "from among the residents" of the circuit and the fifth member is the presiding judge of the Court of Appeals of the district in which the Judicial Circuit is situated.

As to all members other than the presiding judge, residence

within the Judicial Circuit is a necessary qualification. As to the members elected by the bar, it is significant that only those who reside within the circuit may vote and that they are authorized to elect only those who constitute "two of their number".

The obvious purpose is to have two resident members of the bar to act as the representatives of the entire group of resident members of the bar; that is, in lieu of resident lawyers themselves participating in the selection of nominees to fill a vacancy, two of their number act in their stead. In this context, it would appear evident that unless the representatives of the bar possess the requisite qualifications, not merely at the time of election, but at the time they are to act in behalf of the bar as a whole, the very purpose of the constitutional provision would be defeated. Surely, if a lawyer member of the Commission were suspended from practice or disbarred, it could not reasonably be said that he should nevertheless be entitled thereafter to participate in the nominating process as a member of the bar residing in the Circuit. Residence within the Circuit is of equal importance under the constitutional provision with membership in the bar. The mere fact that the change of residence is to a nearby Circuit instead of one far distant, or even to another state or country, in no way affects the principle involved.

We note that the lay representatives on the commission must also be appointed from "among the residents" of the Circuit. This fortifies our opinion that residing within the Circuit is a necessary qualification, not merely to election or appointment, but to the right to hold the membership and to participate in its important functions. Section 29 (d) contains the further provision: "No member of any such commission shall hold any public office, and no member shall hold any official position in a political party". Surely, it could not reasonably be contended that if a member were to be elected to a party office, he would still be qualified as a member of the commission for the remainder of his term.

Note should also be taken of the fact that the fifth member of the commission is the presiding judge of the Court of Appeals. There is no specific language in the constitution which would vacate the membership of a presiding judge when he ceases to hold that position. Yet, no one would seriously urge such was not the law. Just as continuing in the office of presiding judge of the Court of Appeals is a necessary qualification for any such

person to continue to participate in the functions of the commission at any given time, so too must residence within the Circuit continue to exist in order that a lawyer member may participate in such functions during the time for which he was elected.

Although there is no case directly in point, it is worthwhile to compare the case of State ex rel. Johnson v. Donworth, 127 Mo. App. 377, 105 S.W. 1055, subsequently cited with approval and followed by the Supreme Court En Banc in the case of State ex rel. City of Republic v. Smith, 345 Mo. 1158, 139 S.W. 2d 929. The Donworth case held that an alderman of a city of the 4th class who moved out of the ward he was elected to represent thereby lost his qualifications for such office, one of which was that he must be a resident of the ward. The court held that the requirement that he be a resident of the ward from which he was elected is no less imperative than the requirement that he be a citizen of the United States, or a resident of the city, and that a continuation of such qualifications is required in order to entitle one elected as an alderman to remain as such.

In view of the foregoing, it is our opinion that a member of the commission, other than the presiding judge, who ceases to be a resident of the Judicial Circuit, is no longer qualified to participate in the nomination process.

CONCLUSION

It is the opinion of this office that Mr. Charles A. Mogab is not a resident of the 22nd Judicial Circuit and, therefore, is not qualified to continue as a member of the 22nd Circuit Judicial Commission.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Gary A. Tatlow.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JUNIOR COLLEGE DISTRICT:
TAXATION:
STATE TAX COMMISSION:
PUBLIC UTILITIES:
RAILROADS:
SCHOOLS:

The property of public utilities enumerated in Chapters 151, 153, and 155, RSMo, is subject to 1964 taxation by the Junior College District of Metropolitan Kansas City to the same extent as other property in the district. The State Tax Commission has the duty of apportioning the valuation

of such utilities to the junior college district for 1964 taxation and is authorized to obtain the necessary information for such purpose.

Opinion No. 361

November 16, 1964

State Tax Commission of Missouri
Jefferson Building
Jefferson City, Missouri



Gentlemen:

You have requested our opinion as follows:

"This Commission requests an official opinion from your department as to whether or not, in view of the facts set forth below, public utilities enumerated in Chapters 151, 153, 155, R.S.Mo., 1959, should be required to amend or supplement their annual advalorem property statement made to this agency for the year 1964, so as to include the Junior College District of metropolitan Kansas City.

"The Junior College District of metropolitan Kansas City, Missouri, was created under order of the State Board of Education on June 5, 1964. This organization was in accordance with the provisions of Sections 165.790 to 165.840, inclusive of the Missouri Revised Statutes.

"The election for the creation of the District was held on May 26, 1964, and the various election authorities certified the votes on or before June 2, 1964.

"On June 23, 1964 the Board of Trustees of said Junior College District set the tax

State Tax Commission of Missouri

levy at ten cents on the hundred dollars valuation, and on the same date this rate was sent to the county clerks of Jackson, Clay, Platte and Cass Counties, Missouri."

Your letter assumes, and in our opinion correctly so, that the Junior College District of Metropolitan Kansas City is legally authorized to impose a tax on property in the district for the year 1964, the year in which it was organized, although such district was not established until June 5, 1964.

Section 165.800, RSMo Cum. Supp. 1963, provides for submission to the voters in the district area of a proposition to organize a junior college district with power to impose a property tax. The election is to be held at the annual school election except that where such elections of component school districts in the area are not to be held on the same date, the State Board of Education shall set the date for the election. The results of the election must be transmitted within fifteen days thereafter to the State Board of Education and if the proposition has received a majority of the total number of votes cast, then the State Board of Education enters an order declaring the district organized.

Section 165.817, RSMo Cum. Supp. 1963, requires a junior college district organized under the act to provide college courses of instruction for pupils resident within the district who have completed an approved high school course; and Section 165.820, RSMo Cum. Supp. 1963, provides for the appointment of employees by the directors of the district. The districts thereafter have and exercise all powers which any junior college district could exercise had it been in existence prior to the date of organization. It is obvious that if the district could not levy the prescribed tax for the current year it would be rendered completely impotent and unable to perform its duties and functions until the next succeeding year. Nothing in the language of the law justifies any such interpretation.

This office has heretofore issued an opinion dated October 16, 1957, to Honorable Roy C. Miller, which holds that when a county health center has been established a tax therefor authorized by the voters of the county before October 31 of a given year, then such tax can be levied and collected for such year. We believe the same principle to be applicable here.

State Tax Commission of Missouri

We note from the original record in the case of State ex rel. Benson v. Union Electric Company of Missouri, (Mo. Sup.) 220 SW2d 1; that the St. Louis County Library District levied a tax for the year of its organization in similar circumstances and its right to do so was not in any wise questioned in that case. And in Long v. City of Independence, (Mo. Sup.) 229 SW2d 686, our Supreme Court held that a city had authority to levy and collect a tax on certain property therein notwithstanding that such property did not come within the city limits until after January 1 of the year for which the taxes were levied by virtue of annexation. The basic holding in that case was that all property was subject to tax by the city if it was within the corporate limits when the tax was levied. So, too, with respect to a junior college district, if the levy is made within the time authorized by law, as here, it is of no consequence that the district was not organized until June of the year in question. Parenthetically, we note that in St. Louis & S. F. Ry. Co. v. Gracy, 126 Mo. 472, 29 SW 579, the Supreme Court held that the fact an order for the levy of taxes was not made until after the time the taxes were due and payable would not invalidate the tax, such delay being deemed to be a mere irregularity.

Your question relates specifically to certain public utilities enumerated in Chapters 151, 153, and 155, RSMo, the distributable property of which is assessed by the State Tax Commission. Section 165.827, RSMo Cum. Supp. 1963, provides as follows:

"All real and tangible personal property owned by railroads, street railways, boats, vessels, bridge companies, telegraph companies, electric light and power companies, electric transmission line companies, pipe line companies, express companies, air line companies and other companies and public utilities whose property is assessed by the state tax commission shall be taxed at the same rate of taxation which is levied on other property in such junior college district in the same manner and to the same extent that such property is subject to assessment and taxation for general county purposes, and all of the provisions of chapters 151, 153, 154, and 155, RSMo, shall likewise apply to taxation by such junior college districts

State Tax Commission of Missouri

to the same extent as if such junior college districts were specifically included in the provisions contained in said chapters 151, 153, 154, and 155, RSMo, except that the taxes levied by such junior college districts shall not be included for the purpose of determining the average school levy for the other school districts in the county in which they are situated. The taxes so levied against such property by such junior college districts shall be collected in the same manner as taxes are collected on such property from general county taxes."

This statute in terms provides that the property of the public utilities assessed by the State Tax Commission shall be taxed at the same rate of taxation which is levied on other property in the junior college district in the same manner and to the same extent that such property is subject to assessment and taxation for general county purposes. Thus, the Legislature has clearly manifested its purpose and intent that property of public utilities be taxed at the same rate and to the same extent as all other property in the junior college district. And since all other property is subject to be taxed by the junior college district for the year 1964, it follows that property of public utilities should also be so taxed.

It is, of course, true that the reporting sections, 151.020, 153.030, and 155.020, RSMo, all provide basically that the utilities mentioned therein furnish an annual statement to the State Tax Commission on or before the first day of May of each year setting forth certain required information on the basis of which the Commission may make an assessment of the property of the utility and apportion the valuation to local taxing units. However, there is nothing magical about this date. The mere fact that the junior college district was not in existence prior to the date the reports were filed would not have the effect of relieving the property of the public utilities from the burden of taxation which all other properties in the district must bear. We note that if the required report is not made by May 1, the State Tax Commission, in each instance, is authorized to increase the assessed value of the distributable property of the utility by four percent. If the report is not filed pursuant to statute, then the State Tax Commission is authorized to ascertain the property of the utility and fix its value "from the best information they can obtain". Sections 151.050, 153.050, and 155.050, RSMo.

State Tax Commission of Missouri

It is obvious that the date of May 1 is fixed primarily to enable the State Tax Commission to perform its duties of determining the valuation of the property and apportioning such value more efficiently and expeditiously, and not for the purpose of fixing a date beyond which the property therein required to be reported may not be subjected to the taxing power of various local taxing units. Of importance is the fact that the statutory duty of the State Tax Commission to apportion the value to the respective taxing units is expressed in broad and general language. Section 151.080 does not make the duty of the Commission to make the apportionment dependent upon whether the utility has filed the required report prior to May 1 of the year in question, or even whether the report has been filed at all. (See also Sections 151.030 and 155.050 imposing similar duties of apportionment upon the State Tax Commission.) And Section 165.827 expressly brings junior college districts within the provisions of Chapters 151, 153, and 155, the foregoing statutory provisions are equally applicable to the apportionment of the value of the property of each of the utilities to junior college districts. It follows that the Commission is authorized to and has the duty imposed upon it to make the statutory apportionment of the property of the various utilities to the Junior College District of Metropolitan Kansas City.

The State Tax Commission has ample authority to obtain the necessary information for the purpose of making an apportionment of the property of each utility to the Junior College District of Metropolitan Kansas City. If the utilities refuse to supplement their reports in order to furnish the information necessary for the apportionment, the State Tax Commission is authorized under Chapter 138, RSMo, to examine the books and records of the respective utilities and to examine witnesses under oath and thereby obtain whatever information is required for the purpose of performing its duties of apportioning the property of the utility to the district so that such property may be subjected to taxation for the year 1964 to the same extent as all other property in the junior college district.

CONCLUSION

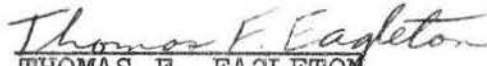
The property of public utilities enumerated in Chapters 151, 153, and 155, RSMo, is subject to 1964 taxation by the Junior College District of Metropolitan Kansas City to the same extent as other property in the district even though such

State Tax Commission of Missouri

district was not established until after May 1, the date by which the utilities must make their reports to the State Tax Commission. The Commission has the duty of apportioning the valuation of such utilities to the junior college district for 1964 taxation, and is authorized to inspect books and records and examine witnesses under oath if necessary to obtain the necessary information.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Joseph Nessenfeld.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

December 22, 1964

Mr. George G. Hatsell, Acting Supervisor
Division of Savings and Loan Supervision
Department of Business and Administration
Room 1101 - Jefferson Building
Jefferson City, Missouri

Dear Mr. Hatsell:

In connection with your inquiry dated October 15, 1964, seeking a reconsideration of Attorney General's Opinion dated March 16, 1959, to Paul R. Sims, we wish to advise you that this problem has been carefully reviewed, the law researched and conferences held with interested attorneys, and the Attorney General has decided to adhere to the opinion to Paul R. Sims dated March 16, 1959.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

By
J. Gordon Siddens
Assistant Attorney General

JGS:10

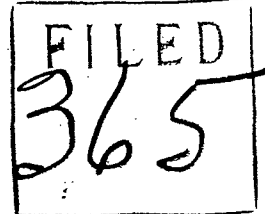
HOSPITAL DISTRICT:
COUNTY COLLECTOR:
TAX FUNDS:

County Collector may turn over tax funds collected for hospital districts to the hospital district.

December 7, 1964

OPINION NO. 365

Honorable Clarence P. Lehnen
Prosecuting Attorney
Montgomery County
Montgomery City, Missouri



Dear Mr. Lehnen:

This is in answer to your official opinion request of October 21, 1964, in which you asked the following question:

"1. Chapter 206 provided for the creation of hospital districts; the election of a Board of Directors of said districts, the legislative and executive powers of said Board of Directors; and election of a chairman of said Board of Directors; and for the appointment of a Secretary and Treasurer of said Board.

"2. There are provisions for financing said Districts by tax moneys and other provisions dealing with said hospital districts.

"3. I am unable to find any provision in said Chapter or related chapters in regard to the handling of the moneys collected for said hospital districts."

In a subsequent communication with this office, you have further stated that the county collector has collected a hospital district tax for a hospital district located in the county of which he is collector as authorized by Chapter 206, RSMo Cum. Supp. 1963, and is holding these funds in a special account for a determination of whether he should turn over said funds to the county treasurer or directly to the hospital district. Chapter 206 makes no provision for the procedure which the county collector is to follow.

Your attention is called to Section 206.010 (2), Cum. Supp. 1963, which authorizes a hospital district to levy and collect taxes and which provides:

"2. When a hospital district is organized it shall be a body corporate and political subdivision of the state and shall be known as '_____ Hospital District', and in that name may sue and be sued, levy and collect taxes within the limitations of this chapter and the constitution and issue bonds as herein provided."

However, we note that Chapter 206 relating to hospital districts is devoid of a provision concerning what officer the county collector is to turn over the hospital district tax. Therefore, we shall limit this opinion to answering the question of what is the proper official for the county collector to turn over collected tax funds.

It is a general rule of construction that omissions in a statute cannot be supplied by construction. However, the general rule is qualified by another rule which provides that when a power is given by statute (power to levy and collect taxes), everything necessary to make it effectual or requisite to obtain the end is necessarily implied.

It is the opinion of this office that the latter rule should be applied in this situation.

In the case of *ex parte Sanford*, 236 Mo. 665, 139 SW 376 (7), the statute expressly granted the Tax Equalization Board the power to subpoena witnesses and send for books and papers. It was conceded that the statute did not authorize the board to cite witnesses for contempt. However, the Supreme Court held that the Tax Equalization Board had power to cite witnesses for contempt by implication in the following words:

"[7] (c) There is a familiar rule of statutory construction which fits this case like a glove fits the hand, namely, that, when a power is given by statute, everything necessary to make it effectual or requisite to attain the end is necessarily implied. . . . It is also a well-settled rule of construction that, where a statute contains grants of power, it is to be construed so as to include the authority to do all things necessary to accomplish the object of the grant. . . . The latter case is very much like the one at bar.

"If we apply this rule to the act under consideration, then there can be no reasonable doubt but what the Legislature intended to and did confer upon the board of equalization

the power to commit witnesses for contempt, where they were duly subpoenaed, and refused to testify or produce the books and papers called for by the subpoena. * * *

In Reilly et al. v. Sugar Creek Tp. of Harrison County, 139 SW2d 525, the power of the township to purchase right-of-way with funds raised by a bond issue under 1929 Mo. St. Ann., Section 79-63 was questioned. Although the statute authorized the distribution of proceeds from the bonds sale in paying the cost of "construction for improving roads", it did not expressly authorize the purchase of right-of-way.

" * * * 'The rule for interpreting statutes, that a power given carries with it, incidentally or by implication, powers not expressed, but necessary to render effective the one that is expressed, would require the construction that authority to incur a debt for the erection of a public building impliedly embraces authority to buy a site for it; and this for the plain reason that without a site the building cannot be erected.' That rule is applicable to the present situation. * * *"

Certainly, the Legislature did not intend that Section 206.010 (2) and 206.060 be ineffectual simply because this Chapter 206 does not specify what official the county collector is to turn over the said tax funds. Thus, it is the opinion of this office that the omission of statutory procedure for turning over tax funds levied under Section 206.010 (2) and 206.060, supra, does not prohibit the county collector from turning over the tax funds collected to the appropriate public officer. Certainly when the Legislature gave the power to levy and collect a hospital district tax by Section 206.010 (2), Cum. Supp. 1963, it also by implication gave the power necessary to make the tax effectual.

We find no statutes which deal with the method by which money received from the hospital district tax is to find its way to the treasurer of the hospital district. Section 206.100, RSMo Cum. Supp. 1963, however, authorizes the board to select a treasurer. Some argument could be made to the effect that the money from said tax should be paid by the county collector to the county treasurer, and thereafter paid by the county treasurer to the treasurer of hospital district. If this procedure were followed, the money could be paid by the county treasurer to the hospital district treasurer only upon order of the county court. The control and expenditure of such funds, however, are not subject


to any discretion by the county court. Based upon the principles above mentioned, it would seem appropriate that the county collector pay such funds directly to the hospital district treasurer and accept the district's receipt therefor. This method of handling the money is consistent with legislative policy adopted in analogous situations. Section 199.150 RSMo 1959--Tuberculosis Districts; Section 235.190 RSMo 1959--Street Light Maintenance Districts; Section 247.500 RSMo 1959--Water Supply Districts; Section 321.270 RSMo 1959--Fire Protection Districts.

CONCLUSION

It is the opinion of this office that the county collector shall turn over tax funds collected for hospital districts as authorized by Section 206.010, RSMo Cum. Supp. 1963, to the hospital district.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Jim DeNeen.

Yours very truly,


THOMAS F. EAGLETON
Attorney General



October 28, 1964

No. 367

Dr. Earl Dawson, President
Lincoln University
Jefferson City, Missouri

Dear Sir:

You request this office to examine the abstract of title covering the following described real estate:

"The southerly 98 feet 8 inches of Inlots Nos. 740 and 741, more particularly described as follows: Beginning at the southwesterly corner of said Inlot No. 740, thence easterly along the southerly line of Inlots Nos. 740 and 741, 208 feet 9 inches to the southeasterly corner of Inlot No. 741; thence northerly along the easterly line of said Inlot, 98 feet 8 inches; thence westerly parallel with the southerly line of said Inlots Nos. 741 and 740, 208 feet 9 inches to the westerly line of Inlot No. 740; thence southerly along the westerly line thereof, 98 feet 8 inches to the point of beginning.

"All of Inlots Nos. 742 and 743.

"All of Inlots Nos. 843, 844, 845 and 846, and all that part of Elm Street which has been vacated by the City of Jefferson and which lies between Jackson Street and Marshall Street; EXCEPT that part conveyed to the City of Jefferson for street purposes by Quitclaim Deed of record in Book 45, page 6, Cole County Recorder's Office; and EXCEPT the southerly 60 feet of Inlot No. 846, conveyed to Leona Ferguson by Warranty Deed of Record in Book 53, page 180, Cole County Recorder's Office.

"All of the above being in the City of Jefferson, Missouri."

Dr. Earl Dawson, President - 2

We are informed that Lincoln University desires to purchase real estate within the above described tract, to wit:

"Beginning at the point of intersection of the Southern Right of Way line of Missouri State Highways 50 and 63 (Rex Whitton Expressway) and the Eastern Right of Way line of Jackson Street; proceeding Southerly along the Eastern Right of Way line of Jackson Street a distance of 200 feet to a point; thence Easterly 90 degrees a distance of 145 feet to a point; thence Northerly 57 degrees 40 minutes East, 161 feet to a point; thence Northerly, along a line of 281 feet from and parallel to the Eastern Right of Way line of Jackson Street, a distance of 105 feet to the Southern Right of Way line of Missouri State Highways 50 and 63; thence Westerly along aforesaid Right of Way line to the point of beginning."

We have examined the abstract of title prepared by Nelson Vincent Abstract and Insurance Company continued to September 23, 1964 at 1:30 p.m., covering the above real estate and it is the opinion of this office that marketable title is vested in the St. Louis Union Trust Company of St. Louis, Missouri, and Forrest P. Carson, as trustees, subject to the following:

1. You should ascertain that there has been no work done or material furnished within the past six months in connection with construction on this property, as the possibility exists that Mechanics' Liens might attach.
2. You should obtain a certificate of the Clerk of the U. S. District Court for the Western District of Missouri, showing no bankruptcy, pending suits, judgments or liens upon the property.
3. You should ascertain that the Federal Estate and Missouri Inheritance Taxes have been paid on both the estate of Hugh Stephens and the estate of Bessie Miller Stephens.
4. You should ascertain the rights of persons in possession, if any, who are not shown of record.
5. You should determine that no recordings affecting

Dr. Earl Dawson - 3

this property appear subsequent to the date of the abstractor's certificate.

6. General taxes for 1963 and prior are shown to be paid.

7. You will take subject to any encroachments, easements, measurements, party walls, or other facts which a correct survey of the premises would show.

The foregoing opinion which I hereby approve, was prepared by my assistant, Louis C. DeFec.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

LCD:df

INSURANCE: Acceptance of regular life insurance law by United Mutual Insurance Company, an assessment plan company.

Opinion No. 368

October 29, 1964



Honorable Ralph H. Duggins
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

Receipt is acknowledged of your letter of October 26, 1964, requesting an opinion from this office pursuant to Section 377.170, RSMo 1959, as to whether documents submitted by United Mutual Insurance Company are in proper legal form for the acceptance of the provisions of Sections 376.010 to 376.670, RSMo 1959, by a life insurance company doing business on the assessment plan under Sections 377.010 to 377.190, RSMo 1959. These documents consist of Notice to Board of Directors, Minutes of special meeting of Board of Directors held October 20, 1964, and Certificate of Amendment.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 377.170, RSMo 1959, and it is the opinion of this office that the same conform to the provisions of Sections 376.010 to 376.670, RSMo 1959, and are not inconsistent with the Constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my assistant, Thomas J. Downey.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

INSURANCE: Articles of Incorporation of Universal Underwriters
Life Insurance Company.

Substitute for
Opinion No. 371

December 3, 1964



Honorable Ralph H. Duggins
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

By letter dated October 5, 1964, you requested an opinion from this office as to whether documents submitted by Universal Underwriters Life Insurance Company are in accordance with Chapter 376 of the Statutes and are not inconsistent with the constitution and laws of this State and the United States. These documents consisted of an executed copy of the Declaration of Intention of the original incorporators of Universal Underwriters Life Insurance Company, a copy of the Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959, and the Publisher's Affidavit as to publication of said Articles as required by Sections 376.050 and 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959. In this regard, your attention is directed to Article III of the Articles of Incorporation wherein the purposes of the corporation and its powers are recited. After stating the various purposes and powers, Article III concludes as follows:

"Without limiting the generality of the foregoing purposes and powers, to do every other thing or act necessary or expedient in carrying on the business of the corporation and to carry out the foregoing powers which may be permitted by law."

Honorable Ralph H. Duggins

The recitation of the corporate purposes is broader than that allowed by law for an insurance company formed under Chapter 376. However, the addition of the limitation provision referred to above conforms the stated purposes to the statutory limitations. Therefore, it is the opinion of this office that the documents submitted are found to be in accordance with the provisions of Chapter 376, RSMo 1959, and not inconsistent with the constitution and laws of this State and the United States.

Although this opinion finds that the Articles of Incorporation are in accordance with the provisions of law, it is suggested that the following provisions of Article III be amended to clarify the stated purposes as indicated.

1. "To write insurance upon the lives of individuals, and every assurance pertaining thereto or connected therewith, and to grant, purchase and dispose of annuities and endowments of every kind and description whatsoever, and to provide an indemnity against death, and for weekly or other periodic indemnity for disability occasioned by accident or sickness to the person of the insured;"

Section 376.010, RSMo 1959, provides that accident and health insurance shall be made a separate department of the business of life insurance, and the cited provision should be amended to include this condition.

2. "To enter into and perform life and disability insurance contracts of all kinds, participating and non-participating, individual and group, to reinsure its risks in whole or in part and to accept reinsurance of all or any part of any risk;"

Reinsurance authority by companies formed under Chapter 376 is limited, particularly by Section 376.520, RSMo 1959, and the cited provision should indicate such limitation.

Honorable Ralph H. Duggins

3. "To purchase stock and securities of other corporations, and to exercise all the rights, powers and privileges of ownership thereof, and to exercise all voting powers thereof;"

The right of companies to purchase stock and securities of other corporations is limited by the Statutes, particularly Sections 375.300 and 376.305, RSMo 1959, and the cited provisions should indicate such limitations.

4. "To buy, lease and otherwise acquire real estate, personalty, appliances and equipment, and to operate or use the same on a commission, lease, or other basis and to sell, encumber and otherwise deal in and dispose thereof, to construct, improve, rebuild, alter, decorate, maintain, manage, control, lease, encumber, or otherwise acquire, hold and dispose of and deal in any and all kinds of improvements upon land belonging to this company;"

The rights of a company formed under Chapter 376 to buy and sell real estate is limited by the Statutes, particularly Sections 375.320, 375.330 and 375.340, RSMo 1959, and the cited provisions should indicate such limitations.

A statement of such corporate purposes and powers in general terms, unconditionally and without reference to statutory limitations, can be misleading to the incorporators and to future shareholders of the company. However, the deficiencies noted are not fatal to the legal form of the Articles of Incorporation, and amendments clarifying these deficiencies will not require republication of the Declaration of Intention.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey, and is substituted for the opinion issued in regard to this subject matter on November 24, 1964.

Yours very truly,

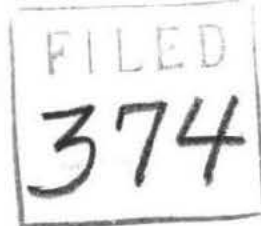
THOMAS F. EAGLETON
Attorney General

TJD/dg

INSURANCE: Articles of Incorporation of First Equity Life Insurance Company of Missouri.

Opinion No. 374

November 24, 1964



Honorable Ralph H. Duggins
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

By letter dated November 4, 1964, you requested an opinion from this office as to whether documents submitted by the First Equity Life Insurance Company of Missouri are in accordance with Chapter 376 of the Statutes and are not inconsistent with the constitution and laws of this state and the United States. These documents consisted of an executed copy of the Declaration of Intention of the original incorporators of the First Equity Life Insurance Company of Missouri, a copy of the Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959, and the Publisher's Affidavit as to publication of said Articles as required by Sections 376.050 and 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with the provisions of Chapter 376, RSMo 1959, and not inconsistent with the constitution and laws of this state and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

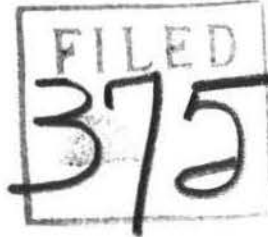
Very truly yours,

THOMAS F. EAGLETON
Attorney General

TJD/dg

Opinion No. 375
Answered by Letter (Finnegan)

November 16, 1964



Mr. Harold Owens, Executive Secretary
Missouri State Soil and Water
Districts Commission
T-7 Building, University of Missouri
Columbia, Missouri

Dear Mr. Owens:

You recently asked two questions concerning the formation of a soil and water district. The questions involve the construction of Section 278.100, subsection 2, RSMo Cum. Supp. 1963, which reads as follows:

"If a majority of all land representatives voting in this referendum, do vote in favor of this establishment, and if in the judgment of the soil and water commission the total number of votes cast does amount to a substantial expression of opinion, the soil and water commission shall at once declare the county or township, or townships thereof, as specified by the referendum, to be established as a soil and water conservation district; but if these provisions are not met, the soil and water commission shall at once declare the question of establishment to have been lost, although another referendum on this question may be called by the soil and water commission for this area at any time after two years from the date of this declaration, provided the commission meanwhile has received evidence of a more general desire for the establishment of a soil and water district for this area. Subsequent to the establishment of a township or townships as a soil and water district any other township or townships in the same county may be added to this soil and water district by the procedure used for the first establishment."

Mr. Harold Owens

Your first question reads:

- "1. Do you have an opinion on what constitutes a 'substantial expression of opinion' at a referendum?"

We must decline answering this question. The question is phrased in abstract terms and we are unable to form an opinion as to the meaning of "substantial expression of opinion" without being informed as to the concrete facts involved in each referendum. There are too many variables involved which make it undesirable and impracticable to determine that a certain fixed percentage of eligible land representatives constitutes a "substantial expression of opinion."

Furthermore, any opinion of this office on this question would be purely advisory. The final judgment of what constitutes a "substantial expression of opinion" rests solely with the commission.

Your second question reads as follows:

- "2. If the referendum on forming a soil and water conservation district is voted favorably (majority), but is not a substantial vote, can another referendum be held without waiting two years?"

If the soil and water commission finds that the total number of votes cast at a referendum does not amount to a substantial expression of opinion, then it is necessary that there be a two year waiting period before another referendum can be held. This is specifically prescribed by Section 278.100 (2), supra, which requires both a majority of favorable votes of those voting for the establishment of a soil and water district and the commission's determination that the vote amounts to a substantial expression of opinion before the commission can declare the area to be established as a soil and water conservation district.

The statute then provides that if these provisions are not met, the commission shall declare the question of establishment as lost and may not hold another referendum until two years after the date of this declaration.

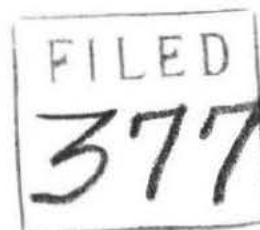
Very truly yours,

THOMAS F. EAGLETON
Attorney General

COUNTY COURTS: The County Court of Ste. Genevieve County
under Section 110.180, RSMo 1959, may
COUNTY DEPOSITARIES: designate an additional bank as a deposi-
tary at a time other than at the May term
COUNTY FUNDS: in an odd-numbered year.

Opinion No. 377

December 9, 1964



Honorable Charles A. Weber
Prosecuting Attorney
Ste. Genevieve County
Ste. Genevieve, Missouri 63670

Dear Mr. Weber:

This is in answer to your request for an official opinion
of this office, which asks:

"May the County Court of Ste. Genevieve
County, prior to the May Term, designate
an additional local bank as a depository
of county funds?"

Section 110.130, RSMo, provides the manner in which county
depositories are to be selected. Subsection 1 of this Section
reads in part as follows:

"Subject to the provisions of Section
110.030 the county court of each county
in this state, at the May term thereof,
in each odd-numbered year, shall receive
proposals from banking corporations, or
associations at the county seat of the
county which desires to be selected as
the depositories of the funds of the
county."

Section 110.030, RSMo, reads as follows:

"The various statutory provisions in
relation to the advertisement for and
receipt of bids and the award of the
funds to the best bidder or bidders for
the whole or any part of any of the
public funds of the character referred

Honorable Charles A. Weber

to in section 110.010 shall be applicable only if and when, at the time of said advertisement and award, it shall be lawful for banking institutions to pay interest upon demand deposits, in which event such applicable statutory provisions shall be complied with; but if, at the time of the advertisement for bids or the receipt of bids or the award of funds, it shall be unlawful for depositary banks and trust companies to pay interest upon such demand deposits, the award or awards of such funds shall be made in each case, without bids and without requiring the payment of any bonus or interest, by the authority or authorities which are by statute empowered to make the awards of such funds upon bids."

Under federal regulations (and Section 362.385, RSMo) it is unlawful for banks to pay interest upon demand deposits. In this situation, Section 110.030 expressly governs, and by its terms suspends all statutory provisions for advertisements for bids and lettings to the highest bidder. And since the operation of Section 110.130, RSMo is expressly made subject to the provisions of Section 110.030, this can only mean that Section 110.130, which relates to the advertisement for and the receipt of bids, is not presently applicable. The designated time for the receipt of bids (the May term in each odd-numbered year) is "in relation" to the advertisement for and the receipt of bids, and is not severable from the remaining provisions of Section 110.130. Hence, the County Court is not required to make the award of county funds as provided in Section 110.130.

Section 110.180, RSMo, provides as follows:

"If for any reason the banking corporations or associations in any county fail or refuse to submit proposals to act as county depositaries as provided in section 110.140, the county court may deposit the funds of the county with any one or more of the banking corporations, or associations in the county or adjoining counties, in the sums or amounts, and for the period of time, the court deems advisable, at the rate of interest, not less than one and one-half percent, as is agreed upon by the court and the banking concern receiving the deposit; the interest to be computed upon the daily balances due the county, as provided in section 110.150.

Honorable Charles A. Weber

Any bank or banking concern agreeing to accept deposits under this section shall provide security as required by section 110.010."

Section 110.140, RSMo, prescribes the procedure for bidding. Inasmuch as it is now legally impossible for banks to submit proposals as provided in Section 110.140, RSMo, the result (for that reason) is that they have "failed" to do so, and therefore Section 110.180, RSMo, is brought into operation. This section authorizes the county court to "deposit the funds of the county with any one or more of the banking corporations . . . for the period of time, the court deems advisable" (but without requiring the payment of interest).

The mere fact that the court has heretofore deposited funds in certain designated banks does not, of itself, under the provisions of Section 110.180, RSMo, preclude the court from designating an additional bank to receive other funds as a county depository at a time other than the May term in an odd-numbered year.

CONCLUSION

Therefore, it is the opinion of this office that the County Court of Ste. Genevieve County, under Section 110.180, RSMo 1959, may designate an additional bank as a depository of county funds at a time other than at the May term in an odd-numbered year.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas E. Eichhorst.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

TEE/dg

RESTAURANTS:
MEALS:
MEAT:
WEIGHTS AND MEASURES:

A hamburger or other meat sandwich may be considered a ready-to-eat meal, sold as a unit, and the meat therein sold for consumption elsewhere than on the premises is not required by Section 413.275 to be sold by weight.

Opinion No. 380

December 4, 1964



Mr. Don Thomason, Commissioner
Department of Agriculture
Jefferson Building
Jefferson City, Missouri

Dear Commissioner Thomason:

This is in answer to your request for an opinion of this office prompted by the following query made to your office:

"Is a hamburger sandwich or other sandwiches made of meat when sold by a regular restaurant or a drive-in restaurant to be 'taken out' a meal or is it in violation of the law? Most restaurants in the St. Louis Metropolitan area and, I am sure, in other metropolitan areas, will sell any item off their menu for carry out purposes. This is especially true at noon time when many people eat in their office. If a person goes into a restaurant and orders just a sandwich off the menu to be carried out and consumed off the premises, is the restaurant violating the law by failure to sell that sandwich by weight?"

The provision against selling certain meat products other than by weight is found in Section 413.275, RSMo. 1959, which so far as here pertinent provides:

"Except for immediate consumption on the premises where sold, or as one of several elements comprising a ready-to-eat meal sold, as a unit, for consumption elsewhere than on the premises where sold, all meat, meat products, poultry, and all sea food except shellfish, offered or exposed for sale or sold as food, shall be offered or exposed for sale and sold by weight.
* * *"

It is our opinion that a hamburger or other meat sandwich falls within the exception contained in this section. A hamburger basically is composed of a piece of ground beef placed between two halves of a bun. Also it often contains onion, pickles and other relishes designed to enhance its taste. Thus the meat is only one of several elements contained in the hamburger. Also, as every American housewife with small children knows, a hamburger, or more often several, quite often comprise an entire meal. This is not peculiar to children. Hamburgers are a common lunch of many people.

The same reasoning is also applicable to other meat sandwiches. Meat is only one of the several elements in such sandwiches. Like hamburgers, meat sandwiches are often sold for consumption elsewhere than on the premises where sold, and are accepted in our way of living as a meal in themselves.

It is our understanding that the purpose of this statute was to protect meat consumers by requiring meat sales to be made by weight rather than by another method which might be more deceiving to a prospective purchaser.

It would be unreasonable to find that the Legislature by the use of the phrase "ready-to-eat meal", did not intend to exclude hamburgers and other meat sandwiches from the requirement that the meat contained therein be sold by weight. Any other conclusion would result in a strained and unnecessary construction of the language of the statute and of its purpose.

CONCLUSION

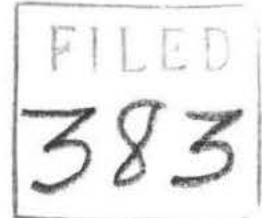
It is the opinion of this office that a hamburger or other meat sandwich may be considered a ready-to-eat meal, sold as a unit, and the meat therein sold for consumption elsewhere than on the premises is not required by Section 413.275, RSMo to be sold by weight.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, John H. Denman.

Very truly yours,


THOMAS F. EAGLETON
Attorney General

November 24, 1964



Honorable Hugh J. White
State Representative
10th District St Louis City
3952 Page Boulevard
St. Louis 6, Missouri

Dear Mr. White:

This is in response to your request for an opinion concerning jury trials in municipal ordinance violation cases.

Under Missouri Supreme Court Rule 37.53(a), all such issues must be tried by the judge unless the defendant or his attorney requests a jury.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

HLM: kd

Answered by Letter (Randolph)

December 9, 1964



Honorable Warren E. Hearnese
Secretary of State
Capitol Building
Jefferson City, Missouri

Dear Mr. Hearnese:

This letter is in answer to your request for an opinion of this office as to whether or not a farmers' mutual insurance company may amend its articles of incorporation or constitution.

Strictly speaking, farmers' mutual insurance companies do not have "Articles of Incorporation". Such companies were incorporated simply by the act of filing the constitution and bylaws with the Secretary of State and paying the ten dollar fee, creating thereby a corporate entity in lieu of an existing unincorporated entity.

The case of Beazell v. Insurance Company, 253 S.W. 125, involving a farmers' mutual insurance company, decided by the Kansas City Court of Appeals, held (1.c. 127):

"The law gave the members the right to make their own constitution and by-laws, and the members being the governing body, and there being no statutory provision forbidding them do do so, it would seem that, having the right to make their constitution in the first place, they would have the inherent right to repeal, amend, or enact a new one, provided, of course, it is done substantially in accordance with their own organic law which they have established for their own government, and is not violative of any statutory provision nor any principal of natural justice."

Assuming that the original constitution and bylaws of a farmers' mutual insurance company which were filed with the Secretary of State authorized amendments and provided the manner

Honorable Warren E. Hearnes

of doing so, we believe that the company may so amend its constitution and bylaws in any respect not violative of any statutory provision, and that these amendments may be filed with the Secretary of State. This would be desirable in order to afford notice thereof.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

DLR:cs/df

OPINION NO. 385
Answered by Letter-Finnegan

November 18, 1964



Honorable Charles G. Hyler
Prosecuting Attorney
St. Francois County Courthouse
Farmington, Missouri

Dear Mr. Hyler:

Your recent request for an opinion of this office concerns the office of County Clerk of St. Francois County. The situation in St. Francois County is as follows:

The County Clerk, Floyd Becker, elected in 1962 for a four year term, resigned in the early part of 1964. The Governor appointed Robert Baker to the office after Becker's retirement. On November 3, 1964, Mr. Vollie Hulsey was elected in the general election to fill the unexpired term of Floyd Becker.

You ask when the person elected for the unexpired term of the County Clerk takes office.

This question has been answered by an opinion of this office under date of June 19, 1953, addressed to the Honorable Phil M. Donnelly, which is enclosed. In the Donnelly Opinion, the unexpired term involved was to be a short term from November, 1954, to January, 1955, while in the present situation the term involved is a long term from November, 1964, until January, 1967. This in no way changes the effect of Section 51.090, RSMo, as to the date when the one chosen to fill the remainder of the term of the County Clerk assumes office.

It is our opinion that the person elected to fill the unexpired term of the County Clerk is entitled to take the office when the result of the general election has been certified.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

Enclosure

GDF:mje

INSURANCE: Advances or loans to a Surplus As
MUTUAL COMPANIES: Regards Policyholders of a mutual
POLICYHOLDERS: insurance company should be paid
SURPLUS: before any part of said surplus is
distributed to the policyholders
as owners of the mutual company.

Opinion No. 383

December 31, 1964



Honorable Ralph H. Duggins
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

By letter dated November 13, 1964, you requested
an official opinion from this office as follows:

"Motorist Mutual Casualty Insurance
Company, organized pursuant to the
provisions of Sections 379.205
through 379.310 RSMo., and Covenant
Security Insurance Company, a joint
stock casualty insurance company,
have submitted to the Division of
Insurance a plan of consolidation
and reinsurance pursuant to Section
376.520 RSMo., seeking approval by
a commission convened under Section
376.520 (4) RSMo.

"Motorist Mutual, as of May 31, 1964,
by its books indicated a 'Surplus as
Regards Policyholders' of \$104,398.26,
made up of unassigned funds of
\$54,398.26, and two \$25,000.00
Guaranty Fund Certificates representing
funds paid to the mutual under Section
379.270 RSMo. to meet the guaranty fund
requirements of Section 379.235 (3)
RSMo. As of September 21, 1964,
according to an interim audit report,

Honorable Ralph H. Duggins

this surplus now stands at approximately \$66,000.00, the unassigned funds being reduced to \$16,000.00.

"Under the plan of consolidation under consideration, the surviving company is to distribute to the policyholders of Motorist Mutual the surplus of the company to which they are entitled.

"The consolidating companies maintain that the distributable surplus is limited to the \$16,000.00 referred to above, and that \$50,000.00 must be paid to the holders of the Guaranty Fund Certificates. The Guaranty Fund Certificates provide that Motorist Mutual is to pay interest at the rate of ten percent (10%) per annum and return the principal to the certificate holders:

"' . . . when the surplus of said company (Motorist Mutual) remaining after providing for all other reserves and other liabilities shall be sufficient to pay the same provided that neither the said principal nor the interest thereon shall be a liability or a claim against the company or any of its assets.'

"In determining whether the interest of the policyholders of Motorist Mutual are properly protected by the plan of consolidation, as is required by Section 376.520 RSMo., I request your opinion as to how the 'Surplus as Regards Policyholders' should lawfully be distributed, that is, in its entirety (\$66,000.00) to the policyholders of Motorist Mutual, or, \$16,000.00 to such policyholders and \$50,000.00 to the holders of the two Guaranty Fund Certificates."

In addition to the facts recited in your letter we have been furnished a pro-forma balance sheet which reflects the actual financial condition of the two companies as of September 21, 1964, and the resulting balance sheet reflecting the financial condition of the consolidated company. This pro-forma balance sheet is set out below:

Honorable Ralph H. Duggins

"PRO-FORMA BALANCE SHEET"

SEPTEMBER 21, 1964

	<u>Covenant Security Insurance Company</u>	<u>Motorist Mutual Casualty Insurance Company</u>	<u>Adjustments See Notes</u>	<u>Consolidated Balance Sheet</u>
<u>ASSETS</u>				
Bonds-Amortized value	\$365,792.98	\$106,503.79		\$ 472,296.77
Cash and bank deposits	83,439.55	411,212.74		494,652.29
Agents balances		168,867.75		168,867.75
Less-Ceded reinsurance balance payable		(27,538.04)		(27,538.04)
Interest due and accrued	3,216.29	1,324.49		4,540.78
Exchange receivable		100.29		100.29
<u>TOTAL ADMITTED ASSETS</u>	<u>\$452,448.82</u>	<u>\$660,471.02</u>		<u>\$1,112,919.84</u>
<u>LIABILITIES, SURPLUS AND OTHER FUNDS</u>				
Reserve for losses		\$152,960.00		\$ 152,960.00
Reserve for loss adjustment expenses		9,363.36		9,363.36
Accrued other expenses	\$ 6,243.96	21,811.00	\$19,895.00(B)	8,159.96
Accrued taxes, licenses and fees		17,387.33		17,387.33
Reserve for unearned premium		392,691.07		392,691.07
Due to Motorist Mutual Insurance Company Policy Holders			16,258.26(C)	16,258.26
<u>TOTAL LIABILITIES</u>	<u>\$ 6,243.96</u>	<u>\$594,212.76</u>		<u>\$ 596,819.98</u>
Capital paid-up	\$200,000.00		19,895.00(B) 50,000.00(A)	\$ 269,895.00
Guaranty Fund Certifi- cates		\$ 50,000.00	50,000.00(A)	
Unassigned surplus funds	246,204.86	16,258.26	16,258.26(C)	246,204.86
<u>SURPLUS AS REGARDS TO POLICY HOLDERS</u>	<u>\$446,204.86</u>	<u>\$ 66,258.26</u>		<u>\$ 516,099.86</u>
<u>TOTAL LIABILITIES AND SURPLUS</u>	<u>\$452,448.82</u>	<u>\$660,471.02</u>		<u>\$1,112,919.84</u>

Honorable Ralph H. Duggins

NOTES:

- (A) Exchange of \$50,000.00 of Guaranty Fund Certificates for \$50,000.00 of common stock of Covenant Security Insurance Company.
- (B) Payment to Casualty Management Company in common stock of Covenant Security Insurance Company for \$19,895.00 of current liabilities due to them.
- (C) Transfer of Unassigned Surplus Funds of Motorists Mutual Casualty Insurance Company as a liability of Covenant Security Insurance Company."

It appears that the Guaranty Fund Certificates represent a low-grade unsecured debt capital in Motorist Mutual Casualty Insurance Company. As stated in your letter, the Guaranty Fund Certificates represent funds advanced (or loaned) to the mutual company to meet reserve requirements under Section 379.235, RSMo 1959. This debt capital was paid into the company pursuant to Section 379.270 and the legal status of the Guaranty Fund Certificates must be determined by the provisions of this section which are as follows:

"1. Any director, officer or member of any such company, or any other person, may advance to such company any sum or sums of money necessary for the purpose of its business or to enable it to comply with any of the requirements of the law, and such moneys and such interest thereon as may have been agreed upon, not exceeding ten per cent per annum, shall be payable only out of the surplus remaining after providing for all reserves and other liabilities, and shall not otherwise be a liability or claim against the company or any of its assets."

Thus, upon a dissolution of the mutual company the Guaranty Fund Certificates are payable only after all other liabilities of the company have been fully satisfied. Upon satisfaction of all liabilities, and in particular upon satisfaction of all liabilities to policyholders under the provisions of the policies, payment of the Guaranty Fund Certificates can be made. After all liabilities of the company have been met any surplus remaining would be distributed to the policyholders because the policyholders are the owners of the mutual company. However, the Guaranty Fund Certificates represent a claim against any remaining surplus

Honorable Ralph H. Duggins

which would be available for distribution to the policyholders and payment of such Guaranty Fund Certificates should be made before any remaining surplus is distributed to the policyholders.

However, rather than being dissolved the mutual company is being consolidated with a joint stock company. The disposition of the Surplus as Regards Policyholders (which includes funds realized from the Guaranty Fund Certificates) upon consolidation must be made with reference to the following provisions of the statutes:

Section 376.520, RSMo -- "6. Said commission, if satisfied that the interests of the policyholders of such company or companies are properly protected, and that no reasonable objections exist thereto, may approve and authorize the proposed consolidation or reinsurance, or of such modification thereof as may seem to it best for the interests of the policyholders, and said commission may make such order with reference to the distribution and disposition of the surplus assets of any such company thereafter remaining as shall be just and equitable.

"7. . . it shall be the duty of said commission to guard the interests of the policyholders of any such company or companies proposing to consolidate"

Pursuant to the cited statutory provisions the commission can make such order concerning the distribution and disposition of a surplus in a consolidation proceeding as shall be just and equitable after the commission is satisfied that the interests of the policyholders are properly protected and safeguarded.

An examination of the pro-forma balance sheet set out above reflects that under the proposed plan of consolidation disposition of the Surplus as Regards Policyholders of the mutual company would be made by issuing common stock of the consolidated company to the holders of the Guaranty Fund Certificates in the amount of \$50,000.00 and by transferring the balance in the amount of \$16,258.26 to a special surplus reserve to be held for the policyholders of the mutual company. It appears that thereafter the special surplus reserve in the amount of \$16,258.26 can be distributed to such policyholders at any time. However, the \$50,000.00 advanced to the mutual company by the holders of the Guaranty Fund Certificates will remain in the consolidated company as permanent capital and will be represented by common stock issued to the holders of the certificates. Therefore, the distribution of surplus in

Honorable Ralph H. Duggins

the amount of \$50,000.00 to the holders of the Guaranty Fund Certificates is a bookkeeping transaction only and the funds represented by the certificates remain in the consolidated company as permanent capital. Thus, the interests of the policyholders (as policyholders and not as owners of the mutual company) are protected and safeguarded by accretion to the permanent capital in the amount of the Guaranty Fund Certificates.

CONCLUSION

It is the opinion of this office that in a plan of consolidation for a mutual company and a joint stock company under Section 376.520, RSMo 1959, lawful distribution and disposition of a Surplus as Regards Policyholders in the mutual company may be made by issuing common stock of the consolidated company to the holders of Guaranty Fund Certificates in the amount of funds advanced by said holders to said surplus and by distributing the balance of said surplus to the policyholders of the mutual company.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Thomas J. Downey.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

COUNTY COURTS:
JOHNSON GRASS:
SURPLUS FUNDS:

A special fund for the eradication of Johnson Grass may be transferred to the general revenue fund, or to such other fund as may be in need of such balance, upon the termination of a county as a Johnson Grass Extermination Area.

Opinion No. 389

December 7, 1964



Honorable Clyde F. Portell
Representative
Ste. Genevieve County
Ste. Genevieve, Missouri

Dear Representative Portell:

By letter dated November 16, 1964, you made the following request for an opinion from this office:

"I would like to have your opinion regarding disposition of Johnson Grass monies in our County. Eradication of Johnson Grass was voted out at the Primary Election on August 4th of this year.

"The balance of money in this fund from last year's taxes is \$8,164.37. The taxes for this year were already extended in the tax books before this issue was voted out, therefore, an estimate of what the tax collections for this year in this fund will be approximately \$10,500.00."

Sections 263.255 through 263.267, RSMo 1959 provide for the eradication and control of Johnson Grass. These statutes provide for the levy and collection of a tax and the purposes for which the fund resulting from the special taxes may be expended. These statutes also provide for the termination of the eradication program. However, these statutes do not provide for the disposition of a balance remaining in the Johnson Grass fund upon termination of the program.

The following provisions of the statutes apply to county finances in general:

Honorable Clyde F. Portell

"Section 50.020. Transfer of county funds. --
Whenever there is a balance in any county treasury in this state to the credit of any special fund, which is no longer needed for the purpose for which it was raised, the county court may, by order of record, direct that said balance be transferred to the credit of the general revenue fund of the county, or to such other fund as may, in their judgment, be in need of such balance.

"Section 50.030. Section 50.020 construed. --
Nothing in section 50.020 shall be construed to authorize any county court to transfer or consolidate any funds not otherwise provided for by law, excepting balances of funds of which the objects of their creation are and have been fully satisfied."

The Missouri Supreme Court, en Banc, construed these statutes in Decker v. Deimer, 129 SW 936 (1910) as follows, l.c. 948:

"The bald question then is: May a county court transfer a surplus and divert it from a fund, having a designated and given purpose, to another legitimate county purpose, by force and reason of the satisfaction of the original use or purpose? We answer that question in the affirmative"

The cited statutes and the court decision construing the statutes are applicable to the question which you have raised.

Conclusion

Upon the termination of the classification of a county as a Johnson Grass Extermination Area, pursuant to Section 263.267, RSMo 1959, the county fund for eradication of Johnson Grass may be transferred by order of the County Court to the credit of the general revenue fund of the county or to such other fund as may be in need of such balance.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Yours very truly,

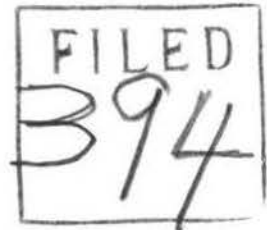

THOMAS F. EAGLETON
Attorney General

COUNTY AUDITOR:
CREATION OF THE OFFICE IN SECOND
CLASS COUNTIES:
VACANCY:

The office of county auditor
is created and vacant on January
1, 1965, in St. Charles County.
The Governor may fill the said
vacancy.

Opinion No. 394

December 22, 1964



Honorable Omer J. Dames
State Representative
St. Charles County
Route #3, Box 76
O'Fallon, Missouri

Dear Mr. Dames:

This is in answer to your official opinion request
regarding the creation of the office of county auditor in
St. Charles County.

The question has been raised as to whether this office
is created as of January 1, 1965, or the first Monday in
January of 1965 in St. Charles County. In your letter you
state that St. Charles County will become a second class
county on January 1, 1965. Section 55.040 creates the
office of county auditor in all second class counties.

Section 55.040 creating the office of county auditor
in second class counties provides:

"The office of county auditor is
hereby created in all counties of the
second class in this state."

Section 55.050 relating to the term of office of the
county auditor provides:

"At the general election in the year
1946, and every four years thereafter,
a county auditor shall be elected in each
county of the second class. He shall be
commissioned by the governor and shall enter
upon the discharge of his duties on the first
Monday in January next ensuing his election.
He shall hold his office for the term of
four years and until his successor is duly

elected and qualified, unless he is sooner removed from office. * * *

The term of the various county auditors presently being served is from the first Monday of January 1963 to 1967.

Section 55.040, supra, creates the office of county auditor in second class counties and since St. Charles County becomes a second class county on January 1, 1965, the office of county auditor is thereby automatically created by authority of Section 55.040 on the same day the county becomes a second class county.

Section 55.050 relating to vacancy in the office of county auditor provides:

"* * * if a vacancy occurs in the office by death, resignation, removal, refusal to act, or otherwise, the governor shall fill the vacancy by appointing some eligible person to the office, who shall discharge the duties thereof until the next general election, at which time an auditor shall be chosen for the remainder of the term, who shall hold his office until his successor is duly elected and qualified unless sooner removed."

The Governor may appoint the county auditor on or after the day that office is vacant which, in this case, is January 1, 1965, because that is the date upon which the office is created and becomes vacant.

CONCLUSION

It is the opinion of this office that the office of county auditor of St. Charles County will be created and become vacant on January 1, 1965, when St. Charles County becomes a county of the second class and at that time the Governor may appoint a county auditor to fill the vacancy.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, Jim DeNeen.

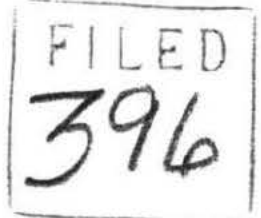
Very truly yours,

Thomas F. Eagleton
THOMAS F. EAGLETON
Attorney General

CONSTITUTIONAL LAW: Proposed legislation relating to the establish-
FINE ARTS: ment of the Missouri State Council on the Arts
CULTURE: and defining the council's powers and duties
does not violate the provisions of the Constitu-
tion of Missouri prohibiting the granting, giving
or lending of public money, property or credit to
private persons, associations or corporations.

December 10, 1964

OPINION NO. 396



Honorable John M. Dalton
Governor of Missouri
Executive Office
Jefferson City, Missouri

Dear Governor Dalton:

You have requested an opinion of this office on the question of whether certain proposed legislation relating to the establishment of the Missouri State Council on the Arts and defining the council's powers and duties violates the Missouri constitutional prohibitions against the granting, giving or lending of public money, property or credit to private persons, associations or corporations. The proposed legislation reads as follows:

"AN ACT

"Relating to the establishment of the Missouri
State Council on the Arts and defining the
Council's powers and duties.

"Be it enacted by the General Assembly of the
State of Missouri, as follows:

"Section 1. There is hereby created and established a state commission, to be known as the 'Missouri State Council on the Arts', to consist of twenty-five members, broadly representative of all fields of the performing and fine arts, to be appointed by the governor from among citizens of Missouri who are widely known for their professional competence and experience in connection with the performing and fine arts. In making such appointments, due consideration shall be given to the recommendations made by representative civic, educational and professional associations and groups, concerned with or engaged in the production or presentation of the performing and

Honorable John M. Dalton, Governor

fine arts generally.

"Section 2. The term of office of each member shall be five years; provided, however, that of the members first appointed, five shall be appointed for terms of one year, five for terms of two years, five for terms of three years, five for terms of four years and five for terms of five years. Other than the chairman, no member of the council who serves a full five-year term shall be eligible for reappointment during a one-year period following the expiration of his term. The governor shall designate a chairman and vice-chairman from members of the council, to serve as such at the pleasure of the governor. The chairman shall be chief executive officer of the council. All vacancies shall be filled for the balance of the of the (sic) unexpired term in the same manner as original appointments.

"Section 3. The chairman may employ, with the approval of the council, such officers, experts and other employees as may be needed and shall fix their compensation within the amounts made available for such purposes.

"Section 4. The duties of the council shall be:

"(1) To stimulate and encourage throughout the state the study and presentation of the performing and fine arts and public interest and participation therein;

"(2) To make such surveys as may be deemed advisable of public and private institutions engaged within the state in artistic and cultural activities, including but not limited to, music, theater, dance, painting, sculpture, architecture, and allied arts and crafts, and to make recommendations concerning appropriate methods to encourage participation in and appreciation of the arts to meet the legitimate needs and aspirations of persons in all parts of the state;

"(3) To take such steps as may be necessary and appropriate to encourage public interest in the cultural heritage of our state and to expand the state's cultural resources; and

Honorable John M. Dalton, Governor

"(4) To encourage and assist freedom of artistic expression essential for the well-being of the arts.

"Section 5. The council is hereby authorized and empowered to hold public and private hearings, to enter into contracts, within the limit of funds available therefor, with individuals, organizations and institutions for services furthering the educational objectives of the council's programs; to enter into contracts, within the limit of funds available therefor, with local and regional associations for cooperative endeavors furthering the educational objectives of the council's programs; to accept gifts, contributions and bequests of unrestricted funds from individuals, foundations, corporations and other organizations or institutions for the purpose of furthering the educational objectives of the council's programs, to make and sign any agreements and to do and perform any acts that may be necessary to carry out the purposes of this act. The council may request and shall receive from any department, division, board, bureau, commission or agency of the state such assistance and data as will enable it properly to carry out its powers and duties her[e]under.

"Section 6. The council shall make an interim report to the governor and the legislature not later than December 31, 1966, and from time to time thereafter.

"(A specific request for an annual appropriation of \$250,000 will accompany the final draft of the bill.)"

Section 38a, Article III, Constitution of Missouri, 1945, states in part,

"The general assembly shall have no power to grant public money or property, or lend or authorize the lending of public credit, to any private person, association or corporation, excepting aid in public calamity, * * *" (various pensions, and other public assistance).

Section 39, Article III, Constitution of Missouri, 1945, states:

"The general assembly shall not have power:

"(1) To give or lend or to authorize the giving or lending of the credit of the state in aid or to any person, association, municipal or other corporation; * * * "

Honorable John M. Dalton, Governor

The proposed legislation does not, expressly or by necessary implication, authorize the Missouri State Council on the Arts to grant, lend or authorize the lending of public money, property or credit. Wherever in the proposed act the expenditure of money is mentioned, it is in terms of payment for services. There is no constitutional prohibition against expenditure of state money by the council for services, as there are no such prohibitions against the Highway Department with respect to paying contractors for building roads or against state institutions with regard to buying food, supplies, utility services and the like.

The proposed act does not permit grants, subsidies, gifts or scholarships to individual artists or to groups of artists, but authorizes payment for services and perhaps goods, in connection with the furtherance of the public policy expressed in the act to foster "the study and presentation of the performing and fine arts and public interest and participation therein".


We do not overlook the case of State ex rel Board of Control of St. Louis School and Museum of Fine Arts v. City of St. Louis, 216 Mo. 47, 115 S.W. 534. That case involved an ordinance of the City of St. Louis providing for a tax to support a proposed "Municipal Art Museum" which was actually a part of Washington University. The Supreme Court held that this would amount to a donation to Washington University, a private corporation, in violation of constitutional prohibitions against granting public money to private entities. Note that the case did not hold that public funds cannot be spent in support of art museums or other cultural activities operated as public enterprises. We feel that the cited case is no hindrance to the proposed legislation referred to in your inquiry.

CONCLUSION

It is the opinion of this office that proposed legislation relating to the establishment of the Missouri State Council on the Arts and defining the council's powers and duties does not violate the provisions of the Constitution of Missouri prohibiting the granting, giving or lending of public money, property or credit to private persons, associations or corporations.

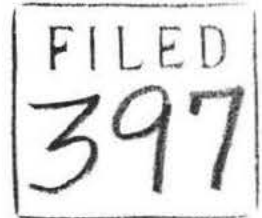
The foregoing opinion, which I hereby approve, was prepared by my assistant Donald L. Randolph.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

*Extra copies
in vault.*

PUBLIC ADMINISTRATOR: Person may hold office of public
SCHOOL BOARDS: administrator and be a member of the
COUNTY SCHOOL BOARDS: county school board at the same time.



December 11, 1964

OPINION NO. 397

Honorable Charles G. Hyler
Prosecuting Attorney
St. Francois County
Farmington, Missouri

Dear Mr. Hyler:

In your letter of November 24, 1964, you request an official opinion from this office on the following question:

"The Public Administrator, Elect, of St. Francois County expects to run for election, in April, as a member of St. Francois County School Board from the First County Court District of St. Francois County. The question that I am presenting to you and the opinion I am requesting is: Can a person who is holding the office of Public Administrator of a County also hold an office as a member of a County School Board?"

We are unable to find anything in the constitution or statutes prohibiting dual office holding as to the two offices in question. The only question which arises is, "Are the two offices compatible; might there be any conflict of interest between the two?"

67 C.J.S., page 133, Section 23, Officers, states the rule as follows:

"a. In General

"At common law the holding of one office does not of itself disqualify the incumbent from holding another office at the same time if there is no

Honorable Charles G. Hyler

inconsistency in the functions of such offices; but a public officer is prohibited from holding two incompatible offices at the same time. The question of incompatibility depends on the circumstances of the individual case, and conflict of interest is generally the determining factor."

42 Am. Jur., Public Officers, page 926, Sections 58 and 59, states that under the common law, double office holding is not restricted except by constitution or statute unless the functions of the two offices intrude. If the offices are compatible, there is no inhibition against the same person holding more than one office.

Section 70, 42 Am. Jur., defines in some measure what constitutes incompatibility saying that, " * * * the courts, * * * are prone to avoid the formulation of a general definition and content themselves with the discussion of specific cases * * *." But generally, they are "considered incompatible where such duties and functions are inherently inconsistent" and "antagonism would result from the attempt of one person to discharge faithfully, impartially, and efficiently the duties of both offices."

The case of State ex rel. Walker v. Bus, 135 Mo. 325, compares the office of school director and deputy sheriff and finds them not to be incompatible. The court said, l.c. 338, 339:

"V. The remaining inquiry is whether the duties of the office of deputy sheriff and those of school director are so inconsistent and incompatible as to render it improper that respondent should hold both at the same time. At common law the only limit to the number of offices one person might hold was that they should be compatible and consistent. The incompatibility does not consist in a physical inability of one person to discharge the duties

Honorable Charles G. Hyler

of the two offices, but there must be some inconsistency in the functions of the two; some conflict in the duties required of the officers, as where one has some supervision of the other, is required to deal with, control, or assist him.

* * * * *

"Sheriffs are given power, and it is made their duty, to preserve the peace, arrest and commit to jail all felons and traitors, execute all process and attend upon courts of record.

"The board of directors of the St. Louis public schools has charge, control and management of the public schools and of all the property appropriated to the use of the public schools within said city.

"We are unable to discover the least incompatibility or inconsistency in the public functions of these two offices, or where they could by possibility come in conflict or antagonism, unless the deputy sheriff should be required to serve process upon a director as such. We do not think such a remote contingency sufficient to create an incompatibility. The functions of the two offices should be inherently inconsistent and repugnant. *State ex rel. v. Goff*, 15 R. I. 507.

"It has been held in this state that the office of clerk of the circuit court was not incompatible with that of clerk of the county court. *State ex rel. v. Lusk*, 48 Mo. 242. The possibility of a conflict in the duties of these two offices seems to me to be greater than in those of deputy sheriff and school director.

Honorable Charles G. Hyler

"These two offices then being neither repugnant to the constitutional or statutory prohibitions, nor incompatible, they may properly be held by one person. Judgment of ouster is denied. All the judges concur."

On this same subject in *Bruce v. City of St. Louis*, 217 S.W. 2d 744, the court said, at 748:

"The limitation at common law upon the holding of two or more offices at one and the same time extends no farther than to prohibit the holding of incompatible offices. Any further inhibition must be constitutional or legislative."

Our Supreme Court, en Banc, in *State v. Grayston*, 163 S.W. 2d 335, 1.c. 339, sets out the rule as follows:

"* * * The settled rule of the common law prohibiting a public officer from holding two incompatible offices at the same time has never been questioned. The respective functions and duties of the particular offices and their exercise with a view to the public interest furnish the basis of determination in each case. Cases have turned on the question whether such duties are inconsistent, antagonistic, repugnant or conflicting as where, for example, one office is subordinate or accountable to the other."

The office of public administrator concerns itself with the handling of estates and guardianships and is limited practically without exception to probate matters. (Section 473.730, et seq., RSMo 1959.)

As a member of the county board of education, the officeholder's duties would pertain solely to school reorganizations (Section 165.657, et seq.). We can see no possible connection whatsoever between the two offices nor can we conceive of any situation where a conflict might arise.

Honorable Charles G. Hyler


In the absence of either constitutional or legislative sanctions we can see no inconsistency in holding the office of public administrator and that of an elective member of a county board of education at one and the same time.

CONCLUSION

Therefore, it is the conclusion of this department that under the authorities and for the reasons stated herein, one may hold the office of public administrator and be a member of the county board of education at the same time.

The foregoing opinion, which I hereby approve, was prepared by my Assistant, O. Hampton Stevens.

Yours very truly,


THOMAS F. EAGLETON
Attorney General



December 10, 1964

Honorable Peter J. Grewach
Prosecuting Attorney
Lincoln County
Troy, Missouri

Dear Mr. Grewach:

This is in response to your Opinion Request No. 400 dated November 25, 1964, in which you have asked several questions concerning the situation in which the young man who has been elected Prosecuting Attorney of Lincoln County has failed to pass the Bar examination and several problems that arise as a result thereof.

1. In our opinion, the person elected Prosecuting Attorney at the November, 1964 election, but who is not duly licensed to practice law as an attorney in Missouri as required by Section 56.010, Revised Statutes of Missouri 1959, cannot qualify on January 1, 1965, to become the Prosecuting Attorney of Lincoln County, and, therefore, forfeits the term. Attached, find copy of opinion to Lon J. Levvis dated April 25, 1961.

2. The incumbent continues or holds over in office until he resigns or until a new prosecutor is duly elected, or appointed, and qualifies. Constitution of Missouri, Article VII, Section 12.

3. If the incumbent resigns on January 1, 1965, and if the Governor appoints a new prosecutor, then such new prosecutor will serve out the full two-year term unless, of course, such new prosecutor should see fit to resign, etc.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

JGS:10

Attachment

Opinion No. 401
Answered by Letter
(Randolph)

December 17, 1964



Honorable Charles H. Baker
Prosecuting Attorney
Dunklin County
Kennett, Missouri

Dear Mr. Baker:

You have requested copies of opinions of this office to C. E. Murrell of March 19, 1951 and J. R. Gideon of February 18, 1949. The opinion to C. E. Murrell has been withdrawn and is no longer in effect. We enclose a copy of the opinion to J. R. Gideon.

The specific problem set out in your letter is:

"* * * whether the county has the authority to grant to the United States Government a perpetual easement for the erection, maintenance and operation of a line or lines of poles, towers, or other wires, cables and such for the transmission of electric current and, if so, whether the grant should be by the County Court or by a special commission appointed to make the conveyance."

According to the opinion to J. R. Gideon, a county court has the power and authority to convey real estate belonging to the county. Such conveyance can be made by the court itself without the appointment of a commissioner. Section 49.270, RSMo. authorizes the county court "to sell and cause to be conveyed any real estate, goods or chattels belonging to the county * * *". The case of Odell v. Pile, 260 SW2d 521, decided by the Supreme Court of Missouri in 1953, held that a county court was authorized to grant an easement, pursuant to the above cited section of the statutes. We feel therefore

Honorable Charles H. Baker

that the county court may grant to the United States Government the described easement and the conveyance of such grant can be made by the court itself without the appointment of a commissioner. It is assumed that the easement would not be prejudicial to any purpose to which the land involved may have been heretofore dedicated.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

DLR:kd
Enclosure

December 15, 1964



Honorable F. M. Brady
Prosecuting Attorney
Benton County
Warsaw, Missouri

Dear Mr. Brady:

We have your letter of November 28, 1964, in which you request an opinion of this office regarding possible criminal violations arising out of the following facts:

An individual has been appointed a sub-agent by the county clerk for the purpose of selling hunting and fishing permits pursuant to Section 2.25 (a) of the Rules and Regulations of the Missouri Conservation Commission (Wildlife Code). A number of permits have been sold over a period of months by this sub-agent, but he has failed to remit the fees therefor to the county clerk as required by the previously cited section and has converted them to his own use. The permit fees involved amount to several hundred dollars.

In that the sub-agent acquired possession of the money lawfully and subsequently converted the funds to his own use contrary to law, he is guilty of embezzlement under earlier Missouri statutes, *State v. Roussin*, 354 Mo. 522, 189 S.W. 2d 983. However, in 1955 the General Assembly enacted Sections 560.156-560.161, RSMo 1959, creating the crime of stealing and providing the penalties therefor. A primary purpose in the enactment of these statutes was to eliminate the technical distinctions between the offenses of larceny, embezzlement and obtaining money under false pretenses, *State v. Gale*, Mo., 322 S.W. 2d 852, 854.

Honorable F. M. Brady December 15, 1964

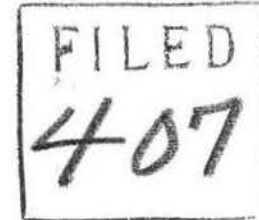
As a result, the sub-agent referred to in your letter may be charged with stealing pursuant to Section 560.156, RSMo 1959. Since the money involved is in an amount in excess of Fifty Dollars, the charge is a felony, Section 560.161 (2), RSMo 1959.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

JM:BJ

December 10, 1964



Honorable Robert E. Yocom
Prosecuting Attorney, McDonald County
Pineville, Missouri

Dear Mr. Yocom:

This is a follow-up to the telephone conversation we had yesterday. If you will recall, I explained to you that the position presently being taken by the Department of Revenue is that they will allow gasoline tax payments to any city in Missouri as long as they meet the following two requirements: (1) The city must be incorporated, and (2) the city must have a population of more than 200 according to the last preceding federal decennial census.

It is my understanding that you wish to incorporate the presently unincorporated city of Rocky Comfort, Missouri. May I suggest that in order that you meet the census requirement that you correspond with the Bureau of Census in Washington, D. C. and request a certification from them as to the number of inhabitants living within the boundary lines of Rocky Comfort, as of April 1, 1960. Once you have obtained the incorporation of Rocky Comfort and have received a Bureau of Census certification that the geographical area of this city contained more than 200 persons on April 1, 1960, then you should forward this to the Department of Revenue along with the request that Rocky Comfort start receiving gasoline tax payments under Article IV, Section 30(a), Constitution of Missouri, 1945.

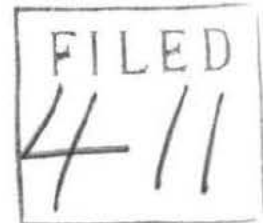
It is my understanding that this letter contains sufficient information for you to proceed in this case and that you will correspond with this office requesting a withdrawal of your opinion request.

Yours very truly,

EUGENE G. BUSHMANN
Assistant Attorney General

EGB/cs

December 11, 1964



Honorable Brunson Hollingsworth
Prosecuting Attorney
Jefferson County
Courthouse
Hillsboro, Missouri 63050

Dear Mr. Hollingsworth:

This is in answer to your Opinion Request No. 411 dated December 3, 1964, in which you ask whether our Opinion No. 79 dated November 10, 1964, to Ralph B. Nevins, is applicable to second class counties.

We call your attention to Section 50.550, Revised Statutes of Missouri 1959, concerning the annual budget of class one and class two counties, which contains the following language:

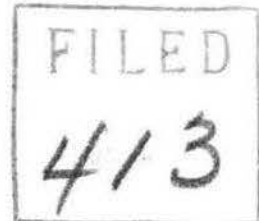
"The annual budget shall present a complete financial plan for the ensuing year. It shall set forth all proposed expenditures * * * for the repair and upkeep of bridges other than on state highways and not in any special road district * * *."

This language only refers to bridges and does not mention roads and highways. The prohibition, therefore, against spending gasoline tax money in first and second class counties in special road districts applies only to bridges and does not apply to roads and highways in special road districts in first and second class counties.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

December 31, 1964



Honorable E. J. Cantrell
Representative, 6th District
St. Louis County
3406 Airway
Overland 14, Missouri

Dear Representative Cantrell:

This letter is in answer to your request for an opinion on the question of whether a city of the fourth class may by an ordinance establish minimum housing standards.

A city of the fourth class has limited powers. It can exercise only such powers as are expressly granted by statute or those necessarily incident to or implied by the powers expressly granted, *City of Richland v. Null*, 194 Mo. App. 176, 185 S.W. 250.

With respect to housing standards and related subjects, we find the following statutory authority granted to fourth class cities. Section 79.370, RSMo. 1959, provides that the Board of Aldermen may by ordinance secure the general health by:

"* * * any measure to regulate, suppress and abate slaughterhouses, slaughtering animals, stockyards, soap and other factories, pig pens, cow stables, and other stables and dairies, and to remove the same, and to regulate or prevent the carrying on of any business which may be dangerous or detrimental to the public health, or the manufacturing or rendering of articles obnoxious to the health of the inhabitants; and to pass ordinances for the prevention of nuisances and their abatement."

Honorable E. J. Cantrell

This section does not grant to the city the power to declare that a particular condition is a nuisance which is not so at common law or by statute. City of Sturgeon v. Wabash Railroad Company, 223 Mo. App. 633, 17 S.W.2d 616.

Under Section 79.410, RSMo. 1959, the board of aldermen may:

"* * * prohibit and prevent all encroachments into and upon sidewalks, streets, avenues, alleys and other public places of the city, and may provide for the removal of obstructions from the sidewalks, curbstones, gutters and crosswalks, at the expense of the owners or occupants of the ground fronting thereon, or at the expense of the person causing the same; they may also regulate the planting of shade trees, erecting of awnings, hitching posts, lamp posts, awning posts, telephone, telegraph and electric light poles, and making of excavations through and under the sidewalks or in any public street, avenue, alley or other public place within the city. * * *"

Section 79.450, RSMo. 1959, provides in part:

"3. The board of aldermen may also regulate and control the construction of buildings, the construction and cleaning of fireplaces, chimneys, stoves and stovepipes, ovens, boilers, kettles, forges or any apparatus used in any building, manufactory or business which may be dangerous in causing or promoting fires, and may provide for the inspection of the same.

"4. The board of aldermen may also provide by ordinance limits within which no building shall be constructed except of brick or stone or other incombustible materials, with fireproof roofs, and impose a penalty for the violation of such ordinance, and may cause buildings commenced, put up or removed into such limits in violation of such ordinance, to be removed or abated."

Section 89.020, RSMo. 1959, reads:

Honorable E. J. Cantrell

"For the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of all cities, towns, and villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures, the percentage of lot that may be occupied, the size of yards, courts, and other open spaces, the density of population, the preservation of features of historical significance, and the location and use of buildings, structures and land for trade, industry, residence or other purposes."

Section 89.040, RSMo. 1959, provides:

"Such regulations shall be made in accordance with a comprehensive plan and designed to lessen congestion in the streets; to secure safety from fire, panic and other dangers; to promote health and the general welfare; to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to preserve features of historical significance; to facilitate the adequate provision of transportation, water, sewerage, schools, parks, and other public requirements. Such regulations shall be made with reasonable consideration, among other things, to the character of the district and its peculiar suitability for particular uses, and with a view to conserving the values of buildings and encouraging the most appropriate use of land throughout such municipality."

The term "minimum housing standards" is a little vague and we are not sure just what you have in mind and of course we have not seen the proposed ordinance, yet it would appear that unless the ordinance carries out one of the powers expressed in the aforementioned statutes it would seem doubtful that such an ordinance would be valid as authorized by statute. We do not express an opinion as to the validity of any particular proposed ordinance.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

DLR:rp

SCHOOLS:
STATE UNIVERSITY:
STATE COLLEGES:

As regards to the University of Missouri and its branches, Lincoln University and the five state colleges, that: 1. Under the Constitution and Statutes of Missouri a graduate of an accredited high school does not have an absolute legal right to be admitted. 2. The governing boards of these institutions have the authority to set by rules and regulations admission requirements which are reasonable and not arbitrary. 3. The provisions of neither Article IX, Section 1(a), Missouri Constitution of 1945, nor Section 160.090(2), RSMo 1959, prevent the governing boards of these institutions from adopting reasonable and non-arbitrary admission requirements.

December 29, 1964



OPINION NO. 415

Honorable R. J. (Bus) King, Jr.
State Representative
10th District St. Louis County
39 Ridgemoor Drive
Clayton 5, Missouri

Dear Mr. King:

This official opinion is issued in response to your request of December 11, 1964.

Your letter states the following questions:

- "1. Does any graduate of an accredited Missouri high school have an absolute right to be admitted to a public college?
- "2. Does the University of Missouri have the authority to adopt reasonable rules as to admission of graduates of accredited Missouri high schools?
- "3. Does Section 160.090, RSMo 1959, or any other Missouri statute prevent Missouri University or our state colleges from adopting reasonable rules as to the admission of graduates of accredited Missouri high schools?

"I would appreciate it if, in answer to my opinion request, you would set forth in outline or summary form such admission rules (both resident and non-resident) as are currently in effect at the University of Missouri (including its branches at Rolla, Kansas City, and St. Louis), Lincoln University, and finally each of the five state colleges."

In general, state legislatures may by statute impose reasonable requirements for admission to state colleges and universities. Such requirements do not violate the Fourteenth Amendment of the United States Constitution. Waugh v. Board of Trustees, 237 U.S. 589; Hughes v. Caddo Parish School Board, 57 F. Supp. 508.

Rather than prescribe admission standards by statute, the legislature may empower the board of regents or curators to make necessary rules and regulations. When so empowered, the board may set such admission requirements as are reasonable and not arbitrary. Newman v. Graham, Idaho, 349 P2d 716; Foley v. Benedict, Tex., 55 SW2d 805; Lesser v. Board of Education, 239 NYS2d 776.

Our research reveals that the courts of this state have never specifically considered the legality of admission requirements set by the state universities or colleges.

However, admission requirements of the Harris Teachers College were upheld by our Supreme Court in the case of Kayser v. Board of Education, Mo., 201 SW 531. The board had adopted an admission requirement whereby graduates of St. Louis Public Schools who were in the upper two-thirds of their class were admitted to the college without examination. All others were required to qualify by examination. The court held that the Harris Teachers College was not a public school in the sense that grade and high schools are public schools and that the board could limit admissions by reasonable regulations.

The Harris Teachers College was established by and is under the control of the board of education of St. Louis City. Thus, the Kayser case supports but does not specifically authorize the conclusions hereinafter reached regarding the state universities and colleges.

The Legislature has specifically empowered the governing boards of the state colleges and universities to prescribe qualifications for admission.

Section 172.360, RSMo 1959, applicable to Missouri University states:

"All youths, resident of the state of Missouri, over the age of sixteen years, shall be admitted to all the privileges and advantages of the various classes of all the departments of the university of the state of Missouri without payment of tuition; provided, that each applicant for admission therein shall possess such scholastic attainments and mental and moral qualifications as shall be prescribed in rules adopted and established by the board of curators; and provided further, that nothing herein enacted shall be construed to prevent the board of curators from collecting reasonable tuition fees in the professional departments, and the necessary fees for maintenance of the laboratories in all departments of the university, and establishing such other reasonable fees for library, hospital, incidental expenses or late registration as they may deem necessary." (Emphasis added.)

The curators of Lincoln University have the same power.
Section 175.040, RSMo 1959:

"It is hereby provided that the board of curators of the Lincoln University shall organize after the manner of the board of curators of the state University of Missouri; and it is further provided, that the powers, authority, responsibilities, privileges, immunities, liabilities and compensation of the board of curators of the Lincoln University shall be the same as those prescribed by statute for the board of curators of the state University of Missouri, except as stated in this chapter."

Sections 174.120 and 174.130, RSMo 1959, are applicable to the state colleges:

"Each state teachers college shall be under the general control and management of its board of regents, and the board shall possess full power and authority to adopt all needful rules and regulations for the guidance and supervision of the conduct of all students while enrolled as such; to enforce obedience

to the rules; to invest the faculty with the power to suspend, or expel any student for disobedience to the rules, or for any contumacy, insubordination, dishonesty, drunkenness or immoral conduct; to appoint and dismiss all officers and teachers; to direct the course of instruction; to designate the textbooks to be used; to direct what reports shall be made; to appoint a treasurer for such college, and to determine the amount of his bond, which shall be in amount not less than ten thousand dollars; and to have the entire management of the college, including qualifications for admission. (Emphasis added.)

"Each board may make such rules and regulations for the admission of students as may be deemed proper."

These statutes are clear and express in granting the power to adopt admission standards. However, as you have requested, we will consider whether any other state law abrogates or limits the above express authorization.

You inquire whether Section 160.090, RSMo 1959, would prevent Missouri colleges and universities from adopting reasonable admission requirements to apply to graduates of accredited state high schools.

Section 160.090(2), RSMo 1959, provides:

"The state board of education shall:

"(8) Classify the public schools of the state, subject to such limitation as may hereafter be provided by law, establish requirements for the schools of each class, formulate rules governing the inspection and accreditation of schools preparatory to classification, and such accredited school work shall be given full credit in requirements for entrance to and classification in any educational institution supported in whole or in part by state appropriation." (Emphasis added.)

We are not aware of any court opinion construing this statute. We note that a similar provision was in effect when the Kayser case, supra, was decided. (See: Section 10923, RSMo 1909).

It is our opinion that the above quoted statute does not require state colleges and universities to admit, without further qualification, all graduates of accredited state high schools. Rather, we read the statute to require all state educational institutions to give the same academic credit value for work in accredited state high schools as is given by the state board of education. In short, these institutions cannot discount work done at an accredited high school.

If Section 160.090(2) is construed as requiring educational institutions to admit all graduates of accredited high schools, it would be in direct conflict with Sections 172.360, 174.120 and 174.130 which expressly authorize the establishing of admission qualifications. Statutes must be read together and construed to be in harmony if possible. Since Section 160.090(2) can be read harmoniously with these other statutes, we so read it.

Thus we conclude that Section 160.090(2) does not prevent state colleges and universities from establishing reasonable admission qualifications applicable to graduates of accredited state high schools so long as the same credit value is given for accredited high school work, as is given by the state board of education.

The only other state law, to our knowledge, that might appear to prevent the reasonable regulation of admissions is Article IX, Section 1(a), Missouri Constitution of 1945, which provides:

"A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, the general assembly shall establish and maintain free public schools for the gratuitous instruction of all persons in this state within ages not in excess of twenty-one years as prescribed by law. * * *"

A similar provision was contained in the Missouri Constitution of 1875, i.e., Article XI, Section 1. The Supreme Court of Missouri, en banc, considered the provision of the 1875 Constitution in Lincoln University v. Hackmann, Mo., 243 SW 320. The court held that Lincoln University, Missouri University and the state colleges were not part of the free public school systems of the state. Also in the Kayser case, supra, the court held Harris Teachers College also not to be a "public school" within the meaning of the Constitution.

Honorable R. J. (Bus) King, Jr. - 6

The maintenance of the state university and colleges is authorized under Article IX, Section 9(b) of the 1945 Constitution and not under Article IX, Section 1(a) quoted supra.

Hence, we conclude that Article IX, Section 1(a) of the Constitution of 1945 is not applicable to the state institutions of higher education and does not prevent the adoption of reasonable admission requirements.

You further request that we summarize the currently effective admission requirements of the University of Missouri and its branches, Lincoln University, and also each of the state colleges. An appendix is attached hereto setting forth current admission requirements as shown in the bulletins of the respective schools.

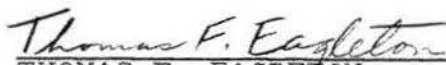
CONCLUSION

Therefore, it is the opinion of this office that as regards to the University of Missouri and its branches, Lincoln University and the five state colleges, that:

1. Under the Constitution and Statutes of Missouri a graduate of an accredited high school does not have an absolute legal right to be admitted.
2. The governing boards of these institutions have the authority to set by rules and regulations admission requirements which are reasonable and not arbitrary.
3. The provisions of neither Article IX, Section 1(a), Missouri Constitution of 1945, nor Section 160.090(2), RSMo 1959, prevent the governing boards of these institutions from adopting reasonable and non-arbitrary admission requirements.

The foregoing opinion which I hereby approve, was prepared by my Assistant Louis C. DeFeo.

Yours very truly,


THOMAS F. EAGLETON
Attorney General

LCD:rp

Attachment

A P P E N D I X

OPINION NO. 415
Issued December 29, 1964

The currently effective admission requirements of the University of Missouri and its branches, Lincoln University, and each of the state colleges, are summarized from their respective official bulletins to be as follows:

Missouri University and its branches -

In general, the admission requirements are:

Missouri residents who are graduated from an accredited high school in the upper two-thirds of their class are admitted without examination; those in the lower one-third of their graduating class must qualify by examination and are admitted only on a probation status.

Nonresidents of Missouri must rank in the upper half of their high school graduating class in order to be admitted, without examination. (At UMKC those in the upper half must also qualify by examination).

School of Mines and Metallurgy at Rolla admits all graduates of accredited high schools. If the applicant does not have a high school certificate he must take an examination.

Lincoln University, Jefferson City -

Admission may be gained by certification of fifteen units of high school work or by passing an examination. The University

"* * * reserves the right to reject any applicant whose character and scholastic records elsewhere were unsatisfactory or who is not officially recommended by the principal or some other certified officer of the school from which he comes. For nonresidents of Missouri the University reserves the right to reject any applicant for any reason it considers adequate."

Northeast Missouri State Teachers College, Kirksville -

"Graduates of accredited high schools in Missouri will be admitted * * *".

Nonresidents must be in the upper three-fourths of their graduating class or they may qualify by examination if they have a "C" average, or else, they may enroll provisionally during the summer term.

Central Missouri State College, Warrensburg -

Apparently all graduates of accredited high schools are admitted.

Southeast Missouri State College, Cape Girardeau -

Applicants with a certificate of an accredited high school are admitted. If the applicant has no certificate he may be admitted by examination.

Southwest Missouri State College, Springfield -

All graduates of accredited Missouri high schools are admitted. Nonresident applicants are required to take an examination unless in the upper two-thirds of their graduating class.

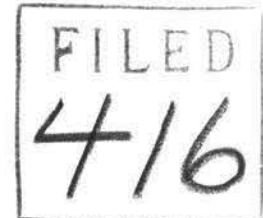
Northwest Missouri State College, Maryville -

Apparently all graduates of accredited high schools are admitted.

INSURANCE: Acceptance of regular life insurance law by Manchester Life Insurance Company, a stipulated premium plan company.

Opinion No. 416

December 14, 1964



Honorable Ralph H. Duggins
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

By letter dated December 9, 1964, you requested an opinion from this office pursuant to Section 377.450, RSMo 1959, as to whether documents submitted by Manchester Life Insurance Company are in proper legal form for the acceptance of the provisions of Sections 376.010 to 376.670, RSMo 1959, by a life insurance company doing business under the stipulated premium plan pursuant to Sections 377.200 to 377.460, RSMo 1959. These documents consist of the Certificate of Amendment, Minutes of Special Meeting of Board of Directors, and Waiver of Notice of Special Meeting.

Section 377.450, provides that the Articles of Incorporation and bylaws shall be amended to conform to the provisions of Sections 376.010 to 376.670 the same as if the company had originally been incorporated thereunder. This section also provides that the amended articles, together with other documents, shall be submitted to the attorney general for his examination and approval of the legal form thereof. Upon such examination the following comments are tendered.

1. The Certificate of Amendment submitted sets forth only the amendments to the Articles of Incorporation. We construe Section 377.450 to require the entire articles as amended to be submitted. This office is unable to determine whether or not the amended articles of incorporation are in accordance with the provisions of Sections 376.010 to 376.460 unless we are able to examine the entire document.

Honorable Ralph H. Duggins

2. Proposed Article Sixth recites that one of the purposes for which the company is formed is to provide for indemnity against death or disability occasioned by accident or sickness. Pursuant to Section 376.010 Article Sixth should provide that such accident and health insurance shall be made a separate department of the business of the company.

3. Proposed Article Third provides that the amount of the capital stock shall be \$200,000.00. Section 376.280, Cum. Supp. 1963, provides that no company formed under the provisions of Sections 376.010 to 376.670 shall commence to do business unless upon an actual capital of at least \$200,000.00 and a surplus of at least \$200,000.00. Proposed Article Third should include a provision for a surplus of at least \$200,000.00.

4. The Certificate of Amendment does not show the number of directors or the manner in which the corporate powers granted by Sections 376.010 to 376.670 shall be exercised. The Minutes of Special Meeting of Board of Directors reflect that all of the directors were present, seven in number. Section 376.060 and 376.100 require that the charter of a corporation formed under Sections 376.010 to 376.670 shall set forth the manner in which the corporate powers shall be exercised showing the number of directors, which shall be not less than nine nor more than twenty-one, their powers and duties, the manner of electing them, and such other particulars as may be necessary. The amended articles of incorporation should include a provision in this regard.

Because of the deficiencies above noted, the legal form of the Certificate of Amendment of Manchester Life Insurance Company is not approved.

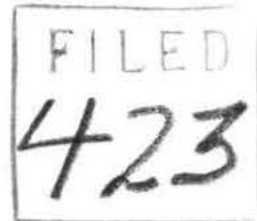
The foregoing opinion, which I hereby approve, was prepared by my Assistant, Thomas J. Downey.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

TJDDg

December 16, 1964



Mr. O. E. Pettijohn
Chief, Real Estate Division
U. S. Army Engineer District, Kansas City
Corps of Engineers
1800 Federal Office Building
Kansas City, Missouri 64106

In Re: MRKRE-MI (Fort Crowder, 7367 & 7382)

Dear Mr. Pettijohn:

This is in answer to your letter of recent date regarding a right-of-way easement, which the Missouri State Highway Department has requested over an existing road located on the Fort Crowder Military Reservation.

As you stated in your letter, Public Law 87-852 provides that the relinquishment of legislative jurisdiction by a Federal agency to the state may be accomplished by filing with the Governor of the state a notice of relinquishment to take effect upon acceptance thereof or by proceeding as a state law may provide.

The State of Missouri has no statutes as to acceptance by the state of the relinquishment of Federal jurisdiction in such situations. Therefore, it is our view that the relinquishment of the legislative jurisdiction may be accomplished under Public Law 87-852 by the filing with the Governor of a notice of relinquishment which relinquishment shall take effect upon acceptance by the Governor.

Yours very truly,

THOMAS F. EAGLETON
Attorney General

CBB/fh

INSURANCE: Articles of Incorporation of Kennedy National Life Insurance Company.

Opinion No. 433

December 29, 1964



Honorable Ralph H. Duggins
Superintendent
Division of Insurance
Jefferson Building
Jefferson City, Missouri

Dear Mr. Duggins:

By letter dated December 22, 1964, you requested an opinion from this office as to whether documents submitted by Kennedy National Life Insurance Company are in accordance with Chapter 376 of the statutes and are not inconsistent with the Constitution and laws of this State and the United States. These documents consisted of executed copy of the Declaration of Intention of the Original Incorporators of Kennedy National Life Insurance Company, a copy of the Articles of Incorporation of such corporation to be formed under the provisions of Chapter 376, RSMo 1959, and the Publisher's Affidavit as to publication of said Articles as required by Sections 376.050 and 376.070, RSMo 1959.

An examination of the documents referred to in the preceding paragraph has been made as required by Section 376.070, RSMo 1959, and it is the opinion of this office that the same are found to be in accordance with the provisions of Chapter 376, RSMo 1959, and not inconsistent with the Constitution and laws of this State and the United States.

The foregoing opinion, which I hereby approve, was prepared by my Assistant Thomas J. Downey.

Very truly yours,

THOMAS F. EAGLETON
Attorney General

TJD/dg